

The Proposal of a Public-Private Partnerships as an Element of Evolution of Space Law in Colombia

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Abstract

Colombia's space policy has been chaotic and inefficient. Since its inception in 1979, to date, it has not been able to consolidate any space project or create a real institution in charge of the subject. Nevertheless Colombia, began the process of creating a space policy and a space law framework, on the occasion of the launch of the satellite Libertad 1 (2006) by the University Sergio Arboleda. The first step that was given in this respect was the creation, by means of decree No. 2442 of the President of the Republic, in July 2006, of the Colombian Space Commission. The second step came with the planned acquisition of a telecommunications satellite, with the expedition of a CONPES, a important document of the Ministry of Planning, which establishes the legal framework of this project. Some changes in tax law and procurement regulations were made in occasion of this project. The third step is the result of the work of the commission on the purchase of a Remote Sensing Satellite whit the creation of a new CONPES. The aforementioned projects have moved the members of the commission to take advantage of the great reform of the Colombian public administration in order to propose the creation of a real space agency. The role of the new agency would be the creation and implementation of a space policy in order to carry out the various projects. Nevertheless, the project was rejected and the bill was not adopted. Unfortunately the projects, neither gave results or satellites were purchased In this situation, the evolution of the legal framework was stopped and only a few small changes were made. However, a new interpretation of the Bill 1508 of 2012 on the legal regime of the Public-Private Partnerships in Colombia, is allowing an important evolution of space activities and may be the future and the basis of space activities in Colombia and the legal framework of these activities This paper seeks to expose the evolution of the legal framework in space activities in Colombia and analyze this new interpretation of a Public-Private Partnerships bill, to determine how it could be the basis of the new Colombian space legal framework.

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I. Introduction

The Colombian space policy has been chaotic and for the present it is not possible to predict which is going to be his future. Up to the date, there have not been concrete results in spatial matter and the projects that have been elaborated, failed. There are many factors that are playing against his implementation in the country.

In fact, from the economic point of view, the priorities of the country at this moment are the peace, the post-conflict and the projects of infrastructure. In Addition, the problems of economic growth and the fall of the price of the oil have diminished the purchasing power of the Colombian State.

From the institutional point of view, the uncertainty on the institutions in charge of the space policy has suspended the development of this policy and the international cooperation.

Finally, the creation a legal framework to promote the space activities has been abandon and it will not promote it in a short term.

Taking in account this problematic panorama, it has arisen on from the private sector, an important idea, to use the legal framework of the Public-Private-Partnership for the implementation of space projects. This interpretation of the bill 1508 of 2012 allows to avoid the problems of the lack of a legal framework of the space activities, his financing and his easy implementation from the institutional point of view.

This paper aims to expose the evolution of the space policy and the legal framework related to space in Colombia and the possible application of the PPP legal framework to space projects as an important solution.

II. The Evolution of the Colombian Space Policy

The evolution of the policy, institutions and legal framework related to space you have been chaotic, and they result today in the failure of the spatial projects in Colombia. This evolution has had the following stages:

The Sovereignty on the Geostationary Orbit

Since the Declaration of Bogota in 1976, the unique legal development that took place in Colombia was the article 101 of the Constitution of 1991 that established that the segment of the geostationary orbit which is above the territory, does part of the national territory. Though this article has been an object of many interpretations and controversies, his concrete application has not been important and has been something symbolic. Even the Constitutional Court has found mechanisms in order that the treaties related to space matters could be ratified.

The Creation of the Colombian Space Commission (CCE)

Though Colombia took part actively in the international arena in space matter, the country never established a special policy. The first great step was

the creation of the Colombian Space Commission (CCE) after the Space Conference of the Americas, which was organized in Colombia, by the decree Not. 2442 in July 2006. The Commission is an institution without legal personality and brings together different ministries and institutions interested in space topics. The commission's president is the Vice-president of the Republic.

The mission of the CCE are:

1. To coordinate national space activities, promoting the joint use of special technical facilities and favoring the integration and sharing of national resources regarding space matters.
2. To coordinate the domestic policy for the dissemination of stances, policies, criteria and guidelines of the Colombian State on space matters.
3. To coordinate domestic policy for the creation of incentives aimed at involving the private sector in spatial activities.
4. To coordinate policies for the creation of incentives aimed at involving the participation of universities and other research institutions for the scientific and technological development of relevant activities to the space field.
5. To coordinate the national policy for the creation of incentives aimed at involving scientists and experts in space activities.
6. To coordinate the national policy for the promotion of national and international cooperation in space matters, suggesting mechanisms for that effect.
7. To guide the State in the execution of domestic space policy.
8. To guide the State in scientific, technological, and judicial matters including the peaceful use, exploration, and utilization of the outer space and, in general, in all matters relating to space activities, including the development and application of space technologies to contribute to the increase of productivity, efficiency, and competitiveness in agriculture, industry, and commerce as well as other service sectors.
9. To analyze, by request of the Ministry of Foreign Affairs, the advisability of signing treaties, conventions, and international agreements in space matters and to make recommendations on such topics.
10. Also by request of the Ministry of Foreign Affairs, to make recommendations on Colombia's position in international organisms and seminars which deal with space matters.

Despite the good work that the CCE developed in the early years, today this entity has few activities and is in a process of internal restructuring.

The Abandonment of the Satellite Project SATCOL 1

The project of acquisition of the telecommunications satellite SATCOL 1 was the first serious project of Colombia in space. The National Planning Department issued a CONPES, an important act in which funding and the schedule was established. This project planned to give Colombia its first satellite, achieve significant transfer of knowledge and technology and meet the country's needs in telecommunications.

However, despite that an international procurement process was opened, the process came to an end because there were problems in the process and the insurance requirements imposed by Colombian procurement act that satellite companies could not meet.

After this failure, the country opted to promote the implementation of the optical fiber and completely abandoned the idea of acquiring a telecommunications satellite.

The Failure to Create a Colombian Space Agency

In 2011, the CCE, worked on a bill for the creation of the agency. But, the President of the Republic did not endorse it on the grounds of insufficient results from the CCE to justify the creation of the Agency.

The idea of creating the agency is resurging again, but the political and economic conditions are not given.

The Ratification of the “Liability Convention” and “Registration Convention”

An important factor in the development of the legal framework of space activities element was the signing and ratification of the “liability Convention” (Bill 1591 of 2012) and “Registration Convention” (Bill 1569 of 2012). Through the ratification of these treaties the Colombian government sought to give greater legal certainty to operators. These treaties were controlled by the constitutional court, who found no incompatibility between the Conventions and Article 101 of the Constitution.

The Colombian Presidential Program for Space Activities

As an alternative to the problems presented by the Colombian Space Commission, the idea to create the Colombian Presidential Program for Space activities to give further impetus to the space issue in Colombia was propose. By Decree 2516 November 15 of 2013 this program that originally was also in charge of the Vice President was created. Among its functions they were:

1. Propose National Space Policy and the actions and strategies that promote spatial development.
2. To guide and promote the development of the Strategic Plan for Space Development and implementation of derivative plans, programs and projects related to the Colombian Spatial Development.

3. Promote interagency coordination to help the Colombian Space Development.
4. Promote and coordinate actions with the relevant authorities for compliance with current space law in the country.
5. Promote, promote, coordinate and promote academic, scientific and technological development and the aerospace industry in the country.
6. Propose, develop and coordinate communication and dissemination strategies, which to publicize the benefits of space technologies for the country's development and welfare of Colombians.
7. Promote the appropriation of knowledge and technology in space matters for social benefit.

The End of SOTCOL Satellite Project

Another misstep in the Colombian space policy was the abandonment of Sotcol project. This project aimed to provide the country with its first earth observation satellite. For several years the CCE worked in the technical specifications that should have the satellite to meet the needs of the public sector. But when the project was ready, the Vice-president of the republic decided to leave in 2014, the project because it did not consider it a priority for the country and considered it very expensive.

The Colombian Space Policy Today

Today, Colombia's space policy is stagnating, although it is true the Sotcol project continues and as well the idea of creating a space agency. Nevertheless, there is no real political will to develop a space policy and all economic resources and staff are dedicated to peace and post-conflict. Therefore, the responsibility for the development of space activities in Colombia is the private sector. The use of the legal framework of the PPP is the only option.

III. The Colombian Legal Framework on Public-Private-Partnership

The regulatory framework of the Public-Private-Partnership in Colombia has its origins in the paragraph 2 of Article 32 of the Bill 80 of 1993 and the Decree 4533 of 2008, under which private could present private initiatives for the development of infrastructure projects.

Since the Government highlighted the need to establish an investment system that would give security to investors and boost the development of the country's infrastructure, the Congress of Colombia issued the Bill 1508 of 2012 and the Decree No. 1467 2012 establishing the legal framework for Public Private Partnerships (hereinafter "PPP").

PPPs are defined by the Bill as follows:

“The Public Private Partnerships are an instrument of involvement of private capital, which materialize in a contract between a Public entity and a natural or legal person of private law, for the provision of public goods and related services, involving retention and risk transfer between the parties and payment mechanisms, related to the availability and the quality of service infrastructure and / or service.”

In the regulatory field after the Bill 1508 of 2012, the government has issued regulation through decrees that have been collected in Decree 1082 of 2015, in which different topics are discussed such as:

- The nature of bidders in public private partnership projects.
- The availability, service levels and quality standards.
- Definition of public input.
- Public and private initiatives for development projects.
- The pre-sorting system.
- Risk treatment.
- Approvals of projects.
- The implementation of Public Private Partnerships in the water sector and sanitation.

According to Article 206 of the Bill 1753 of 2015, i.e. the National Development Plan 2014-2018, Public Private Partnership projects competent state agency shall request the National Planning Department a concept and recommendation on the project, which have to establish especially if the project meet the requirements to be developed under the PPP scheme. Therefore, it is the duty of the National Planning Department issuing methodologies and supporting documents that reveal in advance the requirements and parameters to be met by the competent entity to request the concept or recommendations that the National Planning Department has to do for the PPP project.

The mechanism of the PPP has gained success as a means to create the projects, mostly for road infrastructure projects. To July 2016 the National Infrastructure Agency has received and / or originated 130 PPP projects.

The PPP projects range from road infrastructure, health, airports, toll stations, mass and electric transport, navigability on the Magdalena River, Education, Water and Sanitation, Environment, Public Buildings and Urban Renewal, Justice and Satellite Infrastructure for the case PPP which was presented by EUTELSAT through VISION DE VALORES.

Public-private-partnerships can come from different initiatives, one is public initiative in which the public entity is the originator of the subject project of the association, in which case the following steps (Decree 1082 of 2015 and Bill 80 of 1993) are aimed at opening a bidding process: development of specifications, realization of the previous studies, evaluation of the proposals, the procurement process and award of contract by the public entity. All those

private entities interested in the process can present a technical, financial and legal tender. The winner is the one who presents the best economic and technical bid.

Unlike public initiative and in order to optimize the private structure found in the private sector, individuals, natural or legal persons may submit private initiatives based on the financial, legal, technical capacity. They can structure initiatives that will satisfy needs of the public function of the public entity. The private entity, which has the initiative assume the activities of designs, studies, financial and legal feasibility that later give life to a proposal feasibility stage.

The procedure for Private initiative is divided into:

- a. PPP with public funds: If the submitted project requires public resources, these resources may not exceed 30% of the value of investments. The roof has limited private initiatives based in the future cash flows generated by the same service as in the case of roads or hospitals. However, this point is not peaceful in the Colombian doctrine and must evolve. Additionally, a selection process must be established to ensure that other individuals may submit a bid to improve the initial project, in which case the originator shall have the right to improve it.
- b. PPP without public resources: For those projects, the process of signing the contract is shorter because after the originator agrees to the terms and conditions with the public entity within the PPP process follows the call to private market agents that improve the offer presented by the originator. If no one has bid, the parties may proceed to signing the contract. The funding has particular this scenario comes from the future cash flows to be received by the PPP contract.

In any of the above circumstances, in case that the originator is not awarded in the selection process, the winner entity must proceed to the payment of the fees of the structuration of the project.

In the case of EUTELSAT PPP, Vision de Valores raised a private initiative PPP with public resources which do not exceed 30% of the total value of investments. EUTELSAT makes use of its financial capacity and the satellite fleet, assuming the risks and where the State contributions will be made when this has budgetary availability for that.

IV. The Colombian Satellite Public-Private-Partnership Project

Given that Colombia has not developed its satellite industry, as was said before, although it has a strategic geographical position that would allow its orbital positions, have broad coverage in the Americas. Eutelsat through VISION DE VALORES, its representative in Colombia, presented the first private initiative in telecommunications project in 2015 under the Bill 1508

of 2012, to provide immediate connectivity to the country and specially to build a partnership between the private enterprise and the Colombian state for the creation of the satellite industry and the transfer of knowledge and technology in the short, medium and long term.

The legal structure of the PPP proposed to the Colombian state had as objective overcome all obstacles that has suffered Colombia in purchasing processes in the past. Moreover, supported on the technical, operational and financial capacity of EUTELSAT, the PPP will be designed to suit the needs of the Colombian State integrating present and future needs, in order to turn the country in a regional leader in space activities, with a satellite industry in hand to one of the largest operators in the world. Thus avoiding the learning curve that several States have done to promote a sector that has shown that without high qualification and knowledge, its development is very complicated.

As a novelty, in terms of investments, EUTELSAT with VISION DE VALORES has designed a financial system that absorbs some of the expenses that currently has the Colombian government in satellite capacity and has made it a conglomerate of assets such as the use of satellite capacity that meets real needs of the country and knowledge transfer. As a result of which, through the PPP, the savings payment generated is 40% of the cost which currently disburses with national intermediaries. This encourages public procurement criteria of economy of scale, going to the same way of the provisions in the Colombian Procurement Act.

The PPP process began with the design scheme of national planning Department concerning the technical components that should incorporate the project and its sustainability. Within which several elements such as were made:

- a) Agreement on long-term partnership.
- b) Coverage of quantitative needs.
- c) Coverage qualitative needs.
- d) Satellite connectivity.
- e) Connectivity in the last mile.
- f) Operation and maintenance of the communications network.
- g) Transfer of knowledge.
- h) Creation of specialized ICT knowledge.
- i) Creation of business lines that would favor the self-sustainability of PPP were reversed once their property.
- j) Reversal of assets affected by the PPP.
- k) Risk and conditions fair for the Colombian State.
- l) Investments by the dealer.
- m) Leverage investments of the Colombian State with EUTELSAT.
- n) Direct transfer of experience and know-how from EUTELSAT to satellite industry.
- o) Substantial annual state savings that would allow the Colombian government to free financial resources in their government plans.

Given the innovative nature of the satellite PPP proposed to the Colombian State and the implementation of a legal figure that was initially created for highway, port, air and railway infrastructure of the country, the process of socialization and structuring has undergone an evolution that has varied partners who have participated in the process. Consequently, this generated a feedback over project and an important diffusion among state entities. The Colombian State does not have the economic capacity to create a satellite program, and it is the first time that the private sector came with a real solution.

The project of PPP continues evolving and aims to contribute to the fulfillment of connectivity policies and creating new industries that allow associativity and use of natural resources that, require the accompaniment of companies with more technical and financial capacity to effect the transfer of knowledge and technology.

Furthermore, with the PPP Colombia would implement and endorse the policy and tasks that were treated with the National Development Plan Bill No. 1753 of 2015 which reads:

“(...) The national government will promote further development of scientific and technical capacity of the country as a key factor in the creation of the National Agency Espacio. Given the experience and skills of the National Commission of Space formed in the Groups present for Satellite Navigation, Telecommunications, Earth Observation, Astronautics, Astronomy and Aerospace Medicine, Political and Legal Affairs, Knowledge Management, and Infrastructure Colombian Spatial data (ICDE).”

Finally, EUTELSAT continues to work hand to hand with the Colombian government for the completion of a structure of satellite infrastructure that meets the needs of the state.

V. The PPP Legal Framework, a Real Solution?

As discussed above, the use of the figure of the PPP for creating space projects is an important development as this allows solving the problems of the space policy Colombia: on the one hand, the economic issues and the risks assumed by the government are addressed, on the other hand, the problems imposed by the Colombian Procurement Act regarding insurance are avoided, finally, the institutional problem also ceases to be an obstacle, because each entity that requires satellite services can sign a PPP without need for a space agency.

The application of the PPP legal framework is certainly a valid and important solution for the development of space projects, however, it does not solve all problems and all situations that may arise or need in the case of space activities.

VI. Conclusions

This paper shows that the creation of a space policy is something that requires political will, budget, specialized institutions and creating a legal framework.

However, despite the interest that has been in Colombia for the space matters, this policy could not be implemented because they have never given these four conditions and in a short-term solution is not seen.

Therefore, the legal framework of the PPP comes to fill that gap and promptly solve the problems that exist in Colombia, providing a solution easy to implement and that have benefits for the public sector and the private sector.

Perhaps, when the first PPP will be implemented and its benefits are seen, it will be decided in Colombia to create a genuine space policy and a legal framework for space activities.

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