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Mining 2022

Ecuador: Law & Practice
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Ecuador: Trends & Developments
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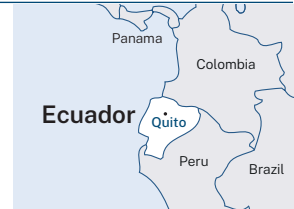
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Law and Practice

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1. MINING LAW: GENERAL FRAMEWORK

1.1 Main Features of the Mining Industry

Ecuador's main export for several decades has been oil. Minerals have not constituted a major export of Ecuador and the first large-scale mines production only started in November 2019, when the Fruta del Norte project, operated by Lundin through its local subsidiary Aurelian, started producing gold and Mirador, operated by Chinese Tongling and China Railway through its local subsidiary Ecuacorriente, started producing copper. Both projects are located on the south east of Ecuador, in Zamora Chinchipe province. It is expected that both projects together will have sales of more than one billion per year. Therefore, mining will jump to be among the biggest export products of Ecuador.

On 10 December 2019, the Fruta del Norte Project made its first export of 177 tons of gold concentrate. The project has a total investment of USD2700 million and expects to produce 310,000 ounces of gold per year and 400,000 of silver.

In 2020, the Mirador Project, owned by Ecuacorriente, also started production of the first large-scale copper mine in Ecuador.

Ecuador has not yet been fully explored for minerals and its potential has in recent years attracted important companies such as Newcrest, Anglo American, BHP, Codelco and others. However, even though mining activities are fully regulated and legally possible, political opposition from different groups makes investment move slowly, with the need to overcome legal and constitutional actions repeatedly brought against mining projects.

Recent decisions taken by the Constitutional Court generate additional concerns for investors, due to the Court's unpredictable decisions prohibiting mining activities on areas already granted and paying little attention to the rule-of-law principle.

1.2 Legal System and Sources of Mining Law

Ecuador is a civil legal system; the main sources of legislation are the Ecuadorian constitution, the mining law, the environment law, plus all the general systems applicable for all activities, including, but not limited to, the civil code, the labour code and tax laws.

There are also several lower regulations underneath the laws that detail further all the pertinent procedures for obtaining a mining concession, maintaining it and all the procedures for environmental and social matters.

The Ecuadorian Constitution provides that natural resources belong to the State of Ecuador, that its exploitation shall be conducted in accordance with all environmental and social provisions and that the benefit of the exploiting company shall always be lower than the benefit of the State of Ecuador. It also provides that community consultation shall be conducted on the pertinent cases in accordance with the treaties into which Ecuador has entered.

Mining law and regulations provide all aspects of the granting of a mining concession, payment of maintenance fees, royalties, passing into different stages, including advanced exploration and exploitation, and all other aspects concerned with a mining concession.

The Environmental Law and regulations provide all the aspects regarding environmental licences indispensable for mining activities.

The civil code is a set of general rules applicable for all matters when there is no special provision for a particular matter. The tax code and related laws and regulations also apply for mining activities, in addition to the labour code for all employment matters.

All legislation existing in Ecuador is applicable to companies operating in Ecuador and therefore all mining subsidiaries holding mining concessions in Ecuador are subject to all the laws applicable in Ecuador.

The Constitutional Court of Ecuador has the capacity to qualify requests for public consultation on different matters, including mining matters. These decisions of the Court become binding.

While several international treaties provide for consultation to ancestral communities, a law defining to whom, when and how a community consultation should be made has not been passed, in part due to the Constitutional Court prohibiting the issuance of a ministerial decree in that regard.

1.3 Ownership of Mineral Resources

In Ecuador, mineral resources belong to the Republic of Ecuador. The State of Ecuador has priority to explore and exploit all minerals and it can do this through the national mining company ENAMI. However, ENAMI does not have enough financial means and technical resources. Therefore, on the few projects it is handling, it has looked for partners.

The central government acting on behalf of the State of Ecuador is allowed to grant mining concessions for the exploration and subsequent exploitation of metallic and non-metallic minerals. Mining concessions for construction materials are granted by municipalities.

The Constitution in its Article 1 mentions that the non-renewable natural resources of the territory of the State belong to its inalienable and imprescriptible patrimony. The central government will have exclusive competence over energy resources: minerals, hydrocarbons, water, biodiversity and forest resources.

Article 408 of the Constitution mentions that non-renewable natural resources and, in general, products of the subsoil, mineral and hydrocarbon deposits, substances whose nature is different from that of the soil, including those found in the areas covered by the waters of the territorial sea and maritime zones, as well as biodiversity and its genetic heritage and the radio-electric spectrum, shall be the inalienable, imprescriptible and unseizable property of the State. These assets may only be exploited in strict compliance with the environmental principles established in the Constitution.

The State will participate in the benefits of the use of these resources, in an amount that will not be less than that of the company that exploits them.

The State shall guarantee that the mechanisms of production, consumption and use of natural resources and energy preserve and recover natural cycles and allow for dignified living conditions.

In spite of the fact that all subsoil products belong to the state, the decentralised autonomous governments in whose territory non-renewable natural resources are exploited or industrialised will have the right to participate in the income received by the State for this activity, in accordance with the law.

1.4 Role of the State in Mining Law and Regulations

The role of the state is always grantor-regulator. However, since the State is also the owner of mineral resources, it can operate through its wholly owned company ENAMI (*Empresa Nacional de Minería*), which is not usually the case. In this case, however, it may be simultaneously grantor-regulator and owner-operator through different government legal entities.

The National Mining Company (ENAMI) shall have the preferential right to apply to the Ministry of Industry for the concession of any free mining area, in accordance with the certification issued for this purpose by the Agency of Mining Regulation and Control. It shall also have the right of first option to apply for the concession of areas whose rights have been extinguished due to expiry, extinction, or nullity, or which have been restored to the State.

Mining concessions are always granted and regulated by the State, independently of those that are granted to a government-owned company or any other petitioner. Once production starts, the role of the State, in addition to controlling environmental, social and labour matters, is to collect royalties and verify that the rule which states that the benefits must always be higher for the State of Ecuador than for the mining concession-holder is satisfied.

The mining sector is structured as follows:

- the Sectoral Ministry (Ministry of Energy and Non-Renewable Natural Resources);
- the Agency for Mining Regulation and Control;
- the National Institute of Geological, Mining and Metallurgical Research;
- the National Mining Company (ENAMI); and
- the municipalities in the competences that correspond to them.

Article 8 of the Mining Law establishes the creation of the Mining Regulation and Control Agency (ARCERNNR) as the technical-administrative body in charge of exercising the state power of surveillance, auditing, intervention and control of the phases of mining activity carried out by the National Mining Company (ENAMI), mixed-mining companies, private initiative, small-scale mining and artisanal and livelihood mining, in accordance with the regulations of this law and its regulations.

The ARCERNNR has the competence to supervise and adopt administrative actions that contribute to the rational and technical exploitation of the mining resource, and to the fair perception of the benefits accruing to the State as a result of its exploitation, as well as to the fulfilment of social and environmental responsibility obligations assumed by the holders of mining rights.

The ARCERNNR has the following attributions, among others:

- to keep a register and cadastre of mining concessions and publish it by computer and electronic means;
- to inspect the mining activities carried out by the holders of mining rights and titles; and
- to grant licences for the commercialisation of mineral substances determined in the present law.

The Association of Researchers for Construction Management (ARCOM) also regulates the assignment and transfer of mining rights as well as other industry issues, as it is the regulating entity.

1.5 Nature of Mineral Rights

All minerals and products thereof found underground belong to the State of Ecuador, as per the provisions of the Ecuadorian Constitution. The law allows the State of Ecuador to grant

a mining concession through the issuance by the Central Government of a mining concession title, which, subject to the provisions of the law, including environmental laws and regulations, enables the mining concession-holder to explore and produce minerals. Mineral rights granted through concessions do not have the status of property, but of rights to explore and produce. Once the minerals are produced, they become the property of the concession-holder, who can sell them freely on the market.

Any natural or legal person, national or foreign, except those prohibited by the Constitution of the Republic and this law, has the power to prospect freely, for the purpose of seeking minerals, except in protected areas and within the limits of mining concessions, in urban areas, populated areas, archaeological areas, goods declared to be of public utility and in Special Mining Areas.

The President of the Republic of Ecuador may declare Special Mining Areas, subject to Article 407 of the Constitution of the Republic, in those areas in which there is potential for mining development and which are not concessioned, with the purpose that the Sectoral Ministry, through its attached entities, carry out cadastres, geological-mining investigations or other types of activities of scientific interest, within their respective competencies.

The declaration of a Special Mining Area shall expressly establish the term of validity of the Special Mining Area, which may not exceed four years; once this term has expired, it shall be lifted without the need for any provision that so declares. In all cases, the declaration will respect the legally established rights or those derived from them.

Natural or juridical persons, national or foreign, who are holders of mining rights or who carry out

mining activities, are subject to the laws, courts and judges of the country.

Mining concessions are divided into large-scale concessions, medium-sized mining and small-scale mining.

Small-scale mining is considered to be that which, due to the characteristics and geological conditions of the deposits of metallic and non-metallic mineral substances and construction materials, as well as their technical and economic parameters, makes their rational exploitation viable in a direct manner, without prejudice to the fact that exploration work precedes it, or that exploration and exploitation work is carried out simultaneously.

Medium-sized mining is considered to be that which, due to the size of the deposits and depending on the type of metallic and non-metallic mineral substances, has been able to quantify reserves that allow the exploitation of those reserves over the processing volume established for the special regime for small-scale mining and up to the volume established by law.

Large-scale mining is considered to be that which exceeds the maximum volumes established for the medium mining modality.

The exploration and exploitation of non-metallic mining must comply with the general rules applicable to mining concessions in the terms provided by the Mining Law and its Regulations.

In the case of construction materials, the State, through the Ministry of the Sector, may grant concessions for the use of surface clays, sands, rocks and other materials of direct employment in the construction industry, with the exception of riverbeds, lakes, sea beaches and quarries that shall be governed by the limitations established by law.

In the framework of Article 264 of the Constitution, each municipal government shall assume the powers to regulate, authorise and control the exploitation of arid and stone materials found in the beds of rivers, lakes, lagoons, beaches and quarries, according to the Special Regulations that will establish the requirements, limitations and procedures to that effect. The exercise of competence shall be limited to the principles, rights and obligations contemplated in the municipal ordinances that are issued in this regard. They shall not establish conditions and obligations other than those established in this law and its regulations.

1.6 Granting of Mineral Rights

The granting authority is the Central Government, through the Ministry of Energy and Non-Renewable Natural Resources, which in turn has agencies in different regions of the country.

The granting of a mining concession is an administrative act issued in a form and substance pre-determined by the law and in a format pre-established from time to time by the Ministry. The terms and conditions of the administrative act are not negotiable. All mining concessions have the same terms except for the area and remaining term of the concession. The law recognises different types of mining: small-scale, medium-scale and large-scale, plus non-metallic and construction material mining concessions.

Ecuadorian laws are applicable to all mining concessions and the mining title does not contemplate international arbitration.

For the granting of mining concessions, the sectoral Ministry will call for a public auction for the granting of all metallic-mining concessions. Likewise, it will call for a public auction for the granting of mining concessions on areas of concessions that have expired or that have been returned or reverted to the State, in which

the petitioners shall participate and present their respective offers in accordance with the procedure established by the law.

The mining concession is an administrative act that grants a mining title, over which the holder has a personal right, which is transferable prior to the mandatory qualification of the suitability of the transferee of mining rights by the sectoral Ministry, and on this may be established pledges, assignments in guarantee and other guarantees provided by law, in accordance with the prescriptions and requirements contemplated in this law and its general regulations.

The mining title, without losing its personal character, confers on its holder the exclusive right to prospect, explore, exploit, benefit, melt, refine, commercialise and dispose of all the mineral substances that may exist and be obtained in the area of that concession, becoming a beneficiary of the economic yields obtained from those processes, within the limits established in the present regulation and, after compliance with its tax obligations, the mining concessionaire may only carry out the activities conferred by this title once the preliminary administrative acts (environmental licence and eventual affectation to bodies of water) have been met.

The mining concession shall have a term of up to 25 years, which may be renewed for equal periods, provided that a written request from the concessionaire has been submitted to the Ministry of the Sector for that purpose prior to its expiry and a favourable report has previously been obtained from the ARCOM and the Ministry of the Environment.

The mining concession will be divided into an exploration stage and an exploitation stage. During the exploration stage, a distinction will be made between the initial exploration period, the period of advanced exploration and the period

of integral economic evaluation of the deposit. It will incorporate the main, secondary and other minerals of economic value.

Mining holders may suspend activities in the case of hospitalisation or when the protection of the health and life of mining workers or communities located in a perimeter of the area where mining activity takes place so requires, as provided in the general regulations of this law, when required by the Civil Defence or when non-compliance with the Environmental Licence by the competent environmental authority is verified. In any case, the provision of suspension of mining activities shall be ordered exclusively by the Minister of the Sector, by means of a reasoned resolution.

A mining concessionaire who is prevented from carrying out his or her mining activities normally, due to *force majeure* or a fortuitous case duly proven, may apply to the Sectoral Ministry for the suspension of the concession term for the period that the impediment lasts. For this purpose, the Ministry of Industry, by means of a reasoned resolution, shall admit or deny any such request.

1.7 Mining: Security of Tenure

Mining concessions are granted through a competition process where the first applicant has the right to match other offers, except in the case of applications made by ENAMI.

Unfortunately, the mining registry and procedure for new applications, called “Catastro Minero,” has now been closed for almost three years and it is impossible to predict when it will be re-opened. Therefore, the only possible way to enter now is to partner with somebody who already holds mining rights. The government has announced the re-opening of the Catastro Minero, in 2022.

In accordance with the mining law, a mining concession has four years on initial exploration, four years on advanced exploration, two years renewable to an additional two years on economic evaluation and the remaining up to 25 years on exploitation. The exploitation period can be extended for up to another 25 years.

Once the initial exploration period or the advanced exploration period, as the case may be, has been completed, the mining concessionaire will have a period of up to two years to carry out the economic evaluation of the deposit and request, before its expiry, the beginning of the exploitation stage and the corresponding subscription of the Mining Exploitation Contract, in the terms indicated in this law. The mining concessionaire shall have the right to apply to the Ministry of Industry for an extension of the period of economic evaluation of the deposit for a period of up to two years from the date of the administrative act accepting that application, and the concessionaire shall pay the annual conservation patent for the period of economic evaluation of the deposit, increased by 50%.

In the event that the mining concessionaire does not request the start of the exploitation stage in the terms indicated in the foregoing, the mining concession shall be declared extinguished by the Ministry of the Sector.

Within six months from the resolution declaring the beginning of the exploitation stage, the mining concessionaire must sign with the State, through the Ministry of Industry, a Mining Exploitation Contract containing the terms, conditions and terms for the construction and assembly, extraction, transportation and commercialisation stages of the minerals obtained within the limits of the mining concession.

The holder of a mining concession may not carry out exploitation work without having previously signed the respective contract.

Maintenance fees per hectare “*patente*” must be paid annually during exploration and exploitation stages, on a scale that is adjusted annually in proportion to the minimum wages of Ecuador. The payment ranges from 2% of a minimum wage; the “*patente*” is currently equivalent to USD7.9 per hectare on small-scale mining to 10% on a large-scale exploitation period, currently equivalent to USD39.50.

The benefits of the project are understood to be the revenues from the sales of minerals, minus amortisation of investments, minus operating costs and minus all pertinent taxes, government royalties and profit-sharing, to become the benefit of the company that must be lower than the benefit of the State that is formed by all taxes and royalties paid by the company in the same fiscal year. An adjustable formula called “*ajuste soberano*” is incorporated into the contracts to maintain this effect of the benefits of the State being higher than the benefits of the operating company.

If a project is considered to be large-scale before entering into the exploitation stage, the concession-holder must execute a contract with the State of Ecuador where minimum investments on the project and future royalties are set up.

The State of Ecuador may declare unilateral termination of a mining concession if the company has breached certain provisions of the law, including non-payment of annual per-hectare maintenance fees or royalties, not meeting minimum commitment investments, employment of children, material environmental damage duly proven through the Ministry of Environment and pertinent courts, and transference of mining rights without prior approval of the ministry.

Unilateral termination is conducted through a process where the company has the right to defend itself and if possible, remediate the cause of generating unilateral termination.

Mining rights are transferable, provided prior approval is granted by the Ministry of Energy and Non-Renewable Natural Resources.

For the transfer process, a request must be submitted to the Ministry specifying the percentage of the area to be transferred and attaching supporting documents.

If the documentation is complete, the Ministry will request the ARCOM to issue three reports: legal, technical and economic. With these ARCOM reports, the Ministry will issue a resolution approving the transfer of concessions.

This resolution must be registered in the Mining Registry in charge of the ARCOM. Subsequently, a Public Deed must be executed between the assignor and the assignee, attaching the registered approving resolution.

At the end of the process, the Public Deed must be also registered in the Mining Registry in charge of the ARCOM.

The mining law establishes the right to free commercialisation; the holders of mining concessions can commercialise their production freely inside or outside the country. However, in the case of gold from small-scale mining and artisanal mining, the Central Bank of Ecuador will market it directly, or through public and private economic agents previously authorised by the Bank.

Natural or legal persons who, without being holders of mining concessions, are engaged in the marketing or export of metallic mineral substances or in the export of non-metallic mineral

substances, must obtain the corresponding licence from the Sectoral Ministry, in accordance with the provisions of the general regulations of the law. The same licence must be obtained by the mining concessionaires who trade in metallic mineral substances or export non-metallic substances from areas outside their concessions.

Natural or legal persons engaged in the internal commercialisation of non-metallic mineral substances, as well as jewellery artisans, will not require this licence. The marketing licences granted are valid for periods of three years, are non-transferable and can be renewed for the same periods.

Clandestine trade in mineral substances is considered in the case of:

- holders of mining concessions who trade internally in metallic mineral substances, or export metallic or non-metallic minerals from other concessions, without the required licence; or
- mining producers who sell metallic mineral substances to persons or entities not authorised to commercialise them.

2. IMPACT OF ENVIRONMENTAL PROTECTION AND COMMUNITY RELATIONS ON MINING PROJECTS

2.1 Environmental Protection and Licensing of Mining Projects

Before any activity on a mining concession can start, an environmental licence granted by the Ministry of Environment must be obtained. There are different type of licences depending on the activity contemplated. For initial exploration activities, the licence can be obtained faster than for advanced exploration or exploitation,

for which it can take up to two years to obtain a licence.

In addition, it is a requirement that an independent certificate from the water authority be obtained, evidencing that the proposed activities shall not have any impact on water sources.

As a signatory of different international treaties, Ecuador also requires community consultation on the cases of indigenous communities and, in all cases, it is required to disclose and inform the people of the area about the potential environmental impacts of each activity.

Community rights and continuous constitutional actions against mining companies brought by political leaders are a serious concern for mining investors and have to be analysed carefully before entering into any project in Ecuador.

Environmental Licensing is an obligatory process for mining concessionaires, so that they can proceed with the different mining stages, and this must be managed through the Unified Environmental Information System (SUIA).

In order to obtain the Environmental Licence, it is necessary to request an Intersection Certificate which verifies the location of the concession within protected areas, or not, since if this is the case, it will be necessary to act differently.

In all cases, the mining title-holder must obtain from the National Environmental Authority the Intersection Certificate from which the intersection of the mining rights in relation to the National System of Protected Areas, Protected Forests and Vegetation, State Forest Heritage or other conservation areas declared by the National Environmental Authority is detached.

If the mining right intersects with the National System of Protected Areas, as far as extractive

activities are concerned, it will proceed according to the provisions of Article 407 of the Constitution of the Republic of Ecuador and the competent environmental regulations.

In the event that the mining right intersects with Protective Forests and Vegetation or the State Forest Heritage, the mining title-holder, prior to the start of the Environmental Licensing process, must apply to the National Forestry Directorate of the Ministry of the Environment for certification of environmental viability qualified with the report on the feasibility of the mining right. This certification will be issued by the National Forestry Director.

The intersection certificate will be issued for the mining rights, among others authorised by the Ministry of the Sector, or for those cases in which the title-holder requires only the Environmental Licence of the operating area.

It is the responsibility of the mining title-holder to contract an external consultant qualified by the Ministry of the Environment, who will be in charge of carrying out the Environmental Impact Study within which a Technical File of the Project must be included, a description of the Study Area and a complete description of the Project prior to the beginning of any stage of exploration, exploitation or others.

Likewise, in conjunction with the Environmental Impact Study, it is necessary to carry out the Environmental Management Plan, which includes methods of evaluation and monitoring of the project, as well as a general schedule containing a budget within which the environmental policy requested by the same ministry is included.

The Environmental Impact Study must identify, describe, quantify and evaluate, in a precise manner and according to the characteristics

of each case, the foreseeable effects that the execution of the mining project will produce on the different environmental and socio-economic aspects.

The Environmental Management Plan will also include aspects of monitoring, evaluation, monitoring and contingency, partial closures of operations and closure and abandonment of mining operations, with their respective programmes, schedules and budgets.

2.2 Impact of Environmentally Protected Areas on Mining

There are different types of environmentally protected areas throughout Ecuador. In most of them, mining is not possible; however, in certain buffer zones it may be possible with prior consent of the Ministry of Environment.

The Ministry of the Environment creates the National System of Protected Areas which guarantees the conservation, management and sustainable use of biodiversity, as well as the functional connectivity of terrestrial, insular, marine, marine-coastal ecosystems and the rights of nature.

Protected areas are priority spaces for conservation and sustainable development. Decentralised autonomous governments should incorporate protected areas into their land-use planning tools.

The National Environmental Authority will carry out periodic technical evaluations in order to verify that the protected areas comply with the objectives recognised for them. If necessary and considering the results of such technical evaluations, the National Environmental Authority may delimit them or change them under technical considerations, as appropriate.

In all cases, the mining owner must obtain from the National Environmental Authority the Certificate of Intersection indicating the intersection of mining rights in relation to the National System of Protected Areas, Protected Forests and Vegetation, State Forest Heritage or other conservation areas declared by the National Environmental Authority.

Article 407 of the Constitution prohibits the extraction of non-renewable resources in protected areas and in areas declared as intangible, including logging. Exceptionally, such resources may be exploited at the justified request of the Presidency of the Republic and following a declaration of national interest by the National Assembly, which, if it deems it appropriate, may convene a popular consultation.

All types of metallic mining in any of its phases are prohibited in protected areas, urban centres and intangible zones.

2.3 Impact of Community Relations on Mining Projects

Communities is the most prominent issue on a mining project in Ecuador. Opposition, political activism and community claims are usual. There is no magic rule on the issue; only companies' best practices can help to overcome community and community leaders' opposition to mining projects.

It is usual for community leaders and local politicians to file constitutional actions before the local judge, requesting suspension or termination of mining rights. The usual arguments are environmental damage and lack of proper consultation. How the local judge is going to rule is unpredictable. The decisions of the local judge can be appealed to a superior court that, again, has broad scope on how to decide. From the superior court it is possible to file an extraordinary protection action with the Constitutional

Court; however, this latter option takes just a few cases and takes quite some time to resolve.

The Mining Law establishes that all title-holders must have a Community Relations Plan that fulfils the purpose of reducing, mitigating and compensating the socio-environmental impacts generated by their activity. This plan will be developed with the communities located in the area of influence of the project, and in co-ordination with the development plans of the local governments involved.

2.4 Prior and Informed Consultation on Mining Projects

The Ecuadorian Constitution provides for several types of consultations, to ancestral aboriginal communities, to the affected population on environmental matters and even to the general population on any matter.

In accordance with the Ecuadorian Constitution and OIT 169, prior consultation is only mandatory for ancestral communities; however, other forms of consultation, such as with the public at large, can also block a project. The Constitutional Court has rejected some of the general requests for consultation but has not been able to hold a clear rule on how and when consultations are possible. Therefore, the issue is still uncertain and remains a great uncertainty for mining projects.

The Constitution recognises and guarantees indigenous communes, communities, peoples and nationalities free, prior and informed consultation, within a reasonable time, on plans and programmes for the prospecting, exploitation and commercialisation of non-renewable resources found on their lands that may affect them environmentally or culturally, allowing them to participate in the benefits that these projects bring and to receive compensation for the social, cultural and environmental damages caused to

them. The consultation to be carried out by the competent authorities shall be obligatory and timely. If the consent of the community consulted is not obtained, the Constitution and the law shall apply.

Article 398 of the Constitution establishes that any State decision or authorisation that may affect the environment must be consulted with the community, to which ample and timely information shall be provided. The consulting subject shall be the State. The law shall regulate prior consultation, citizen participation, deadlines, the subject consulted and the criteria for assessment and objection to the activity submitted for consultation.

If the referred consultation process results in a majority opposition of the respective community, the decision to execute, or not, the project will be adopted by a duly motivated resolution of the corresponding higher administrative instance in accordance with the law.

The Environmental Law establishes that the Competent Environmental Authority shall inform the population that could be directly affected about the possible realisation of projects, works or activities, as well as the possible expected socio-environmental impacts and the pertinence of the actions to be taken. The purpose of the participation of the population will be to collect their opinions and observations to incorporate them in the Environmental Studies, provided that they are technically and economically viable.

A key aspect of the Environmental Impact Study is to include mechanisms of socialisation and citizen participation, so that the population is informed of the environmental impact of carrying out projects; this will be channelled through the tools set out in the Organic Code of the Environment.

2.5 Impact of Specially Protected Communities on Mining Projects

Ecuador is made up of a large ethnic mix of indigenous peoples and immigrants who arrived a few centuries ago. Technically, only the ancestral communities are required to have prior consultation but, considering the large and diverse ethnic mix, everybody claims to be a community subject to consultation and special rights. The issue has to be analysed on a case-by-case basis and it is impossible to predict an outcome.

2.6 Community Development Agreement for Mining Projects

Community development agreements are possible, but not mandatory. It is advisable to have co-operation agreements with local communities and to include them as much as possible as part of the project.

2.7 Environmental, Social and Governance (ESG) Guidelines and Regulations

No material new reforms have been introduced for ESG. Mr Lasso, as the new president of Ecuador, has been making enormous efforts to attract investments in different areas. However, in a recent Constitutional Court decision, it was ruled that in all cases a prior consultation shall be done, that the Court at the request of any person through a “protection action” can revoke environmental licences at their own discretion. There has been a set of consecutive ambiguous decisions of the Constitutional Court, either prohibiting mining activities or ordering popular consultations. Unless there is a substantial change in the Constitutional Court, which is not likely, it will be very difficult for new investments, especially in mining, to be supported in Ecuador by the rule-of-law principle.

2.8 Good and Bad Examples of Community Relations/Consultation Impacting Mining Projects

The worst example is *Cooper Mesa v the Republic of Ecuador*, regarding a large copper deposit. After several years of debate between the company and the community leaders and, independently of winning in court, the government of Ecuador declared unilateral termination of the mining concessions. This resulted in Cooper Mesa winning an arbitration award. The project is now being developed by ENAMI, the Ecuadorian mining company, in association with the Chilean mining company CODELCO.

One of the difficult issues to overcome in Ecuador is illegal mining. The government has been making important efforts lately to combat this, but it has not yet been controlled.

The best example is the Lundin, Fruta del Norte Project that, with a good integration programme with surrounding communities in place, started production on a large-scale mine for gold.

3. IMPACT OF CLIMATE CHANGE AND SUSTAINABLE DEVELOPMENT ON MINING

3.1 Effects

There are no concerns about climate change in general in Ecuador. The big issue is community consultations.

3.2 Climate Change Legislation and Proposals Related to Mining

No legislation is being passed regarding mining and climate change. What is being discussed is the right of the population, whether indigenous or not, to vote in a referendum or other type of consultation against mining projects.

3.3 Sustainable Development Initiatives Related to Mining

Ecuador has many NGOs; some of them promote sustainable development, but most of them simply oppose mining projects, and blocking mining development seems to be their ultimate goal.

4. TAXATION ON MINING AND EXPLORATION

4.1 Mining and Exploration Duties, Royalties and Taxes

The main rule originating in the Constitution is that the benefit of the State shall always be higher than the benefit of the operating company.

The benefit of the State is mainly formed of 12% of profit-sharing, 25% of income tax, royalties and VAT, if applicable. It is important to note that community support or generation of employment is not treated as a benefit for purposes of satisfying the constitutional rule.

The benefit of the operating company is the total amount of sales minus amortisation of investments in accordance with applicable accounting rules, minus all operating costs (it is important to note that contributions to community development are not tax-deductible), minus all amounts paid in royalties between 5% to 8% on large-scale mining projects, minus 12% profit-sharing currently being paid to the central government and minus 25% of income tax.

There is no different treatment for national or foreign investors. While a tax of 5% applies to all transference of funds from Ecuador to abroad, it is exempted for dividends.

4.2 Tax Incentives for Mining Investors and Projects

There are no material incentives, since the rule of the government benefit being greater than the

company benefit is a constitutional concept that does not admit any exemptions.

On large-scale mining projects, it is necessary to execute a contract before entering production. In that contract, stabilisation clauses may be possible, provided that the aforementioned benefit rule is maintained.

4.3 Transfer Tax and Capital Gains on the Sale of Mining Projects

The general tax regime provides for capital gains of up to 10% on the transference of mining concessions' rights or shares, except when the local project represents less than 20% of the value of the total transaction.

5. MINING INVESTMENT AND FINANCE

5.1 Attracting Investment for Mining

Ecuador had a boom in the attraction of mining investment in 2016 and 2017, due to several factors, mainly (i) exploration potential, (ii) at that time it was possible to apply for new mining concessions directly from the government, and (iii) the political and community opposition was manageable.

While the exploration potential remains, the other two factors are not so clear; it is uncertain when it will be possible to apply for new mining concessions and uncertain how the judges and courts are going to rule on constitutional actions aiming to block mining projects.

5.2 Foreign Investment Restrictions and Approvals in the Exploration and Mining Sectors

There are no restrictions to foreign investments. Foreign and Ecuadorian capital and companies receive the same treatment.

5.3 International Treaties Related to Exploration and Mining

Ecuador resigned from most of the treaties it had signed for protections of investments from other countries, called bilateral investment treaties (BITs). The protection of investments can only be achieved from local judges and courts or, eventually, through clauses on the exploitation contract before the production period or a protection of investments' agreement with the Ministry of production aiming to achieve international arbitration for the disputes among the parties.

5.4 Sources of Finance for Exploration, Development and Mining

Exploration, development and mining have been financed from different sources in Ecuador, depending on the type of company behind the projects.

Most of the junior mid-sized companies seek capital in foreign stock exchanges and finance their activities with loans by finding a major as a partner.

The few majors that have arrived have their own resources.

5.5 Role of Domestic and International Securities Markets in the Financing of Exploration, Development and Mining

The domestic securities market has not been a player in the financing of exploration, development and mining in Ecuador. Most of its financing comes from abroad.

5.6 Security over Mining Tenements and Related Assets

It is possible to take security on the shares of the local subsidiaries, the mining concession itself and the assets. Security must be registered on local registers.

6. MINING: OUTLOOK AND TRENDS

6.1 Two-Year Forecast for the Mining Sector

Production of copper on the Mirador project and gold on the Fruta del Norte project, both large-scale projects, gives a sign of opportunity in Ecuador; unfortunately, recent decisions of the Constitutional Court allowing for public consultation to prohibit mining in certain areas has also discouraged many investors.

The arrival into Ecuador of Newcrest, Anglo American, BHP, CODELCO, Fortescue and others in 2016 and 2017 was a sign of trust in the country and eventually a sign of moving into becoming a mining country in replacement of the existing oil exports that may start to decline at some point.

However, recent aggressive opposition of local leaders and politicians and the uncertain signs given by the local judges and courts are probably slowing the pace of investment that the majors had made. It is a period of expectation of clearer signs of society welcoming reliable mining investments from the major players.

COVID-19 has had an important impact on the economy and mining; an emergency decree prohibited most activities until 14 September 2020. However, it is not likely that new decrees will be passed. Activity has slowly been moving back. It is not likely that there will be major legislation related to COVID-19 that impacts mining activity.

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nancial analysis of each project, anticipating the potential risks during execution. The team's experience enables it to find the best investment opportunities and to maintain a stable and reliable projection for each project. It always offers clients assistance for warranting stability and balance, starting with the initial phase of acquisition, up to the completion of the negotiation, exploration and production phases. The firm designs legal strategies for protecting clients' interests during the entire process, always looking to safeguard their investments.

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Trends and Developments

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The Constitutional Court Ruling of the Los Cedros Case

The Ecuadorian Constitutional Court, as established in the Constitution of the Republic of Ecuador, is the highest organ of control, constitutional interpretation and administration of justice in this matter. In recent years, there have been several relevant and important cases related to mining activities that have been resolved by the Constitutional Court; however, there is one recent ruling that has drawn much attention, not only from the mining sector, but also from several other industries in Ecuador.

The case in question is the case known as the “Los Cedros Protected Forest Case”, which was resolved by the Constitutional Court on 10 November 2021. This case began as a protection action (these actions are aimed at the direct and effective protection of the rights recognised in the Constitution of Ecuador and international treaties). Initially, this case was heard in the first and second instance courts. However, due to the seriousness of the matter, novelty of the case, inexistence of a judicial precedent, and national relevance or transcendence, the Constitutional Court selected the case for its review and issuance of a binding precedent.

In March 2017, the Ecuadorian National Mining Company (ENAMI) was duly awarded the mining titles for the Rio Magdalena 01 and Rio Magdalena 02 concessions (together, the Rio Magdalena Mining Project) by the Ministry of Energy and Non-Renewable Natural Resources. In October 2017, the ENAMI, in compliance with mining and environmental laws and regulations, obtained the environmental registry for the Rio Magdalena Mining Project. The environmental regis-

try is a type of environmental licence required for activities that generate a low environmental impact (necessary to be able to carry out initial exploration mining activities). This environmental registry was duly granted by the Ministry of Environment (now the Ministry of Environment, Water and Ecological Transition).

The protection action was filed by the Autonomous Government of Cotacachi, in favour of the Los Cedros Protected Forest, against the Ministry of the Environment and the Ecuadorian National Mining Company (ENAMI), claiming the violation of the rights of nature, the right to a healthy environment, the right to water and the right to an environmental consultation. The decision taken by the Constitutional Court will be analysed below.

Nature Rights

As previously mentioned, the plaintiffs claimed the violation of the rights of nature. Although in this case there was no environmental damage, the Constitutional Court ruled that the rights of nature were indeed violated because the Ministry of Environment granted the environmental registry for the Rio Magdalena Mining Project, when the Ministry of Environment should have refrained from granting any such registry, in application of the precautionary principle established in the Constitution. In other words, nature rights were violated because the precautionary principle was not duly applied.

The precautionary principle established in the Constitution of Ecuador provides that “The State shall apply precautionary and restrictive measures for activities that may lead to the extinction of species, the destruction of ecosystems or the

permanent alteration of natural cycles” and “in case of doubt about the environmental impact of any action or omission, even if there is no scientific evidence of damage, the State shall adopt effective and timely protective measures”.

The Constitutional Court considered that mining activities within the Los Cedros Protected Forest did comply with the three elements of the precautionary principle:

- they generate a potential risk of serious and irreversible damage, since the Protected Forest is considered as a fragile and biodiverse ecosystem;
- there is scientific uncertainty about the negative consequences that mining activities can generate in Los Cedros Protected Forest; and
- the State should have adopted a timely and effective protective measure, in this case, not to grant the environmental registry.

The scientific certainty requirement established by the Constitutional Court is quite unclear. It is not fully understood whether the court considers that it will never be possible to prove that there is scientific certainty on the effects generated by mining activities, and that, therefore, the precautionary principle should always be applied in relation to mining activities, or if, on the contrary, the Court considers that it is possible to provide scientific information that allows the determination of the effects of mining activities in a certain place, and the concessionaires are obliged to present more scientific information on the effects of mining activities prior to obtaining an environmental permit.

If the first scenario applies, mining activities per se will always violate the rights of nature in Ecuador, according to the Constitutional Court, because the precautionary measures will always be applied. However, it is considered that it is more likely that the second scenario is the appli-

cable one, and that, only in this specific case, the concessionaire failed to provide sufficient scientific information to demonstrate that there is scientific certainty regarding the effects of mining in the Los Cedros Protected Forest.

Article 407 of the Constitution prohibits mining activities in protected areas, urban centres and intangible zones; however, the Constitutional Court believes that this article is not of a restrictive and exclusive nature, since it cannot be concluded from this prohibition that mining activities are automatically permitted and authorised in the rest of the national territory, or that, once the constitutional and legal conditions are verified, activities cannot be restricted or suspended in different areas, under a case-by-case analysis.

The prevailing opinion is that, by ruling that protected areas, urban centres and intangible zones are not the only places where mining is prohibited, the Constitutional Court broadens the prohibition of Article 407 of the Constitution by means of a ruling, thus tacitly reforming the Constitution without following the proper procedure. In this respect, the Constitutional Court allows the prohibition of mining activities where the State has previously granted mining concessions and investments have been made.

The Constitutional Court ruled that it is prohibited to carry out mining activities within the Los Cedros Protected Forest, that the precautionary principle should have been applied, that the rights of nature have been violated, and consequently, the Constitutional Court annulled the environmental registry granted for Rio Magdalena Mining Project, which was legally and duly obtained more than four years ago.

This decision taken by the Constitutional Court can be said to violate the right to legal security of the mining concessionaires. Furthermore, the fact that the Constitutional Court can leave

administrative acts granted by the competent authorities without effect violates the legal security, not only of the mining concessionaires, but of all investors in different industries in Ecuador. It is important to consider that nowhere in the ruling does the Constitutional Court analyse, mention, or consider the right to legal security of the mining concessionaire who has acquired rights. Revoking granted environmental permits and prohibiting mining activities in the area of concessions legally granted may generate international arbitrations against the Ecuadorian State.

The Constitutional Court does not prohibit mining in all protection forests; however, it establishes parameters that the environmental authorities will have to comply with (for example, to consider all the implication of nature rights in fragile and biodiverse ecosystems) that will make it difficult for environmental authorities to grant environmental permits in protected forests.

The Right to Water and a Healthy Environment

The ENAMI holds the certificate of non-affectedness to water and the certificate to use water, duly granted by the National Water Secretariat (now Ministry of Environment, Water and Ecological Transition). However, the Constitutional Court ruled that, based on the precautionary principle, mining activities within Los Cedros Protected Forest may cause serious and irreversible damage to the water, thus affecting the ecosystem and human activities, and violating the right of nearby communities to a healthy environment. Therefore, the Court left without effect the certificate of non-affectedness to water and the certificate to use water, which are necessary to carry out mining activities. Once again, the right to legal security of the mining concessionaires has been violated, since despite having favourable administrative acts to carry out activities, the Constitutional Court can, under its criteria alone,

annul the administrative acts that have been duly granted by the competent authorities.

The Right to Environmental Consultation

The Ecuadorian Constitution provides that any decision or State authorisation that may affect the environment must be consulted with the community, which will be informed in a broad and timely manner, and the State is responsible for carrying out any such consultation. In addition, the Mining Law establishes that environmental consultation shall be carried out at all stages of mining, and the Escazú International Agreement establishes that environmental consultation shall be carried out from the initial stages of the decision-making process.

However, a Ministerial Decree and an Executive Decree, from 2015 and 2020 respectively, provide that only medium and high environmental impact activities shall carry out an environmental consultation prior to obtaining the environmental licence. Low impact activities, such as mining initial exploration, which only require an environmental registry, do not need to carry out an environmental consultation. The Ministry of Environment has been applying these Decrees in the past few years.

However, the Court ruled that this interpretation of the Ministry of Environment is unconstitutional and limits the scope of the environmental consultation established in the Constitution. The Court considers that neither the Constitution nor the law excludes from the scope of application of environmental consultation those activities that generate a low environmental impact. Furthermore, the Court ruled that such an interpretation violates the right to participate in environmental matters.

The Constitutional Court rules that the failure to have carried out the environmental consultation prior to obtaining the environmental registry vio-

lates the right to be consulted in environmental matters and brings as an effect the unenforceability and nullity of the environmental registry granted in 2017 in favour of the ENAMI. It should be noted that the rights of nature were violated because the environmental registry should not have been granted, based on the precautionary principle. The failure to undertake the environmental consultation violates the right of the affected communities to be consulted regarding environmental matters, but also cancels the environmental registry granted.

Thus, the Court retroactively through its ruling generates an obligation to carry out an environmental consultation in order to obtain an environmental registry, contrary to what is provided in the regulations applied in the past, and, in the same ruling that generates this obligation, it sanctions the ENAMI for not having complied with this obligation, evidently violating the right to legal security.

In addition, the Court clarifies that protection actions are the appropriate way to claim this consultation right, which is of concern. This opens the door for the communities to start filing protection actions for lack of environmental consultation of other mining projects and thus the mining rights of the concessionaires being affected.

The Constitutional Court is not clear in mentioning whether the ENAMI is now allowed to carry out the environmental consultation to obtain the environmental registry. It could be said that carrying out the environmental consultation now in the Rio Magdalena Project would no longer have any effect because the Court has already prohibited all types of extractive activities within Los Cedros Protected Forest, ruling that mining activities within Los Cedros Protected Forest violate the rights of nature and the right to water and a healthy environment.

Although the Constitution of Ecuador does not prohibit mining activities in all protected forests and this ruling does not prohibit all mining activities in protected forests, it is considered that the environmental authority will have to comply with the parameters established in this ruling, which will make it difficult for the environmental authorities to issue environmental permits and licences within protected forests, even when environmental consultations have been carried out.

The decision Taken by the Constitutional Court:

- declares the violation of the rights of nature of the Los Cedros Protected Forest;
- declares the violation of the right to water and healthy environment of the communities neighbouring the Los Cedros Protected Forest;
- declares the violation of the right to be consulted on decisions or authorisations that may affect the environment;
- annuls the environmental registration and water permits granted for the Magdalena 01 and Magdalena 02 concessions.

Due to the lack of clarity of the ruling, the ENAMI filed a clarification appeal of the following issues:

- that the ruling does not constitute a binding precedent;
- that the ENAMI is fully entitled to apply for a new environmental registry;
- whether this judgment resolves the extraordinary protection action filed by the ENAMI in this case and whether it is the Court's intention to resolve the *litis* of one proceeding through another proceeding;
- whether scientific certainty, by definition, is impossible to achieve;
- whether, in the face of scientific uncertainty, the only remedy the Court sees is the prohibition of activities;

- whether infra-constitutional norms can be sufficient to ensure the principle of prevention;
- what scientific, technical or legal information was used by the Court to confirm that any mining activity in the Los Cedros Protected Forest would be harmful and would cause the destruction of ecosystems, the extinction of species or permanent alteration of natural cycles;
- what the legal basis is that allows the Constitutional Court to expand the exclusion zones of Article 407 of the Constitution in a retroactive manner and to areas previously concessioned by the State and if there are any limits to this power;
- if the mining concessionaires should understand that their rights are subject to the retroactive decisions of the Constitutional Court;
- that the environmental consultation only applies to activities of medium or high environmental impact, as defined by the competent environmental authority;
- that environmental consultation is not required in all mining phases;
- that the requirement of environmental consultation was created through an interpretation of the Constitutional Court in the ruling and cannot be applied retroactively, in accordance with the constitutional right to legal security;
- which are the regulations, constitutional or legal support that expressly confer to the Court the power to order the Ministry of the Environment to adapt the infra-legal regulations corresponding to the issuance of environmental registrations and licences, and the use of water for extractive activities;
- requests that the Court extend the ruling and rule on the acquired rights of the concessionaires;
- requests that the Court explain the methods of constitutional interpretation applied in the ruling and how the Court weighed the constitutional rights in collision to determine

that the rights of nature in Los Cedros should prevail in this case.

The Constitutional Court rejected the clarification of all points requested by the ENAMI, except for one point, about the timing of the environmental consultation. The Court reiterated that at least two environmental consultations must be carried out, one prior to the issuance of the environmental registration and another prior to the issuance of the environmental licence. This is a matter of concern, since it reiterates that this obligation has not been created by the ruling, but that this obligation already exists by virtue of Article 398 of the Constitution. This obligation to have two environmental licences prevails over the Ministerial decree and Executive Decree from 2015 and 2020 respectively, providing that those environmental consultations shall be done only to obtain environmental licences for advanced exploration and production activities.

Conclusion

The view is that the Los Cedros ruling is broad and not clear on many points. It is a ruling that has generated concern in the mining sector, but it has also generated concern in other industries of Ecuador. This is because, in this ruling, the Constitutional Court exceeds its powers by affecting acquired rights granted through administrative acts. Although, on this occasion, it has been about mining acquired rights, in the future this could also happen in other industries.

It is worrying that the State may grant a mining concession to an investor through due process and in compliance with the Constitution and the Law, but that the Constitutional Court may later declare that mining activities in the area of the concession that has been granted could eventually generate damages that violate the rights of nature, or that, based on the precautionary principle, environmental authorities will not grant environmental permits to allow mining activities.

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