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ARGENTINA

Jimena Vega Olmos, Reporter

Environmental Organization Requests Injunction to Suspend the Entire Argentine Offshore Oil and Gas Development Program

On August 1, 2023, Fundación Ambiente y Recursos Naturales (FARN), a local environmental nongovernmental organization, initiated an action before the Federal Court in Administrative Matters in Buenos Aires, seeking the issuance of an injunction against the Federal State ordering it to refrain from granting permits for seismic exploration or hydrocarbon exploitation in Argentina's offshore areas and approving new environmental authorizations for seismic prospecting or exploitation of offshore areas. *See* Docket N° 30593/2023. FARN also requested the court to suspend all existing permits and halt offshore exploration and production.

As a general practice, injunction measures are issued ex parte, and FARN did not request the intervention of the oil and gas producers affected by its application (i.e., the holders of exploration permits issued in the context of the 2019 offshore tender and pre-2019 concessionaires that have been operating in Argentina's offshore areas for the last decade). FARN also opposed the spontaneous appearance of certain producers that, despite not receiving notice of the claim, formally requested to be accepted as parties and urged the court to reject FARN's injunction request.

FARN claimed that the permits previously issued by the Federal State were based on incomplete environmental studies and were issued in violation of the *Escazu* Agreement and local law.

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BOLIVIA

Gonzalo Dávila, Reporter

Bolivia and the Preparation of the Legal Framework to Venture into Green Hydrogen

Decarbonization of Energy: The Importance of Green Hydrogen in and for Bolivia

In the global race for renewable energy and decarbonization towards 2030, Bolivia turns out to be an important participant. Although its most mentioned exponent is lithium, others are betting on hydrogen. Yes, that chemical element that is most abundant on the planet, but not available as a molecule in any deposit, must be obtained from other sources such as gas or fossil fuels.

However, as the hydrogen obtained from these sources contains or generates a large amount of carbon, in the era of energy decarbonization, interest is in "green hydrogen." Its production is obtained from the decomposition of water (H_2O) into the gases of oxygen (O_2) and hydrogen (H_2) through the process of water electrolysis, driven by renewable electrical energy through a direct electric current connected by electrodes to the water. Although it seems like something very new, more than 125 years ago, Jules Verne, in his novel *The Mysterious Island*, foresaw the potential of green hydrogen: "What are you going to burn instead of coal? . . . Water. Water broken down into its elements by electricity will one day be used as fuel."

Bolivian Preparation in Green Hydrogen as a Factor Toward the Energy Transition

To promote a process of decarbonization and reduction of greenhouse gases for a cleaner and more sustainable energy matrix, Bolivia, starting in 2021, has begun

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ARGENTINA

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This injunction request is not the first attempt to suspend the offshore development of Argentina's offshore reserves. In 2022, four similar actions were filed before the federal courts of Mar del Plata, seeking the suspension of activities and the subsequent revocation of the offshore exploration permits granted to Equinor, YPF, and Shell to carry out exploration activities approximately 80 kilometers offshore from the city of Mar del Plata (CAN_100, CAN_108, and CN_114). *See Godoy, Rubén Oscar c/Estado Nacional s/ amparo ambiental*, Docket Nº FMP 58/2022; *Organización de Ambientalistas Autoconvocados c/ Ministerio de Ambiente y Desarrollo Sustentable s/ amparo*, Docket N° FMP 70/2022; *Montenegro, Guillermo Tristán c/ Ministerio de Ambiente y Desarrollo Sustentable s/ amparo ambiental*, Docket N° FMP 98/2022; *Fundación Greenpeace Argentina y otros, s/ amparo ambiental*, Docket Nº FMP 105/2022. Following the initial granting of the injunction by the Federal Court of Mar del Plata N° 2, the producers were able to reverse the measure, and on December 5, 2022, the Federal Court of Appeals of Mar del Plata revoked the lower court's injunction and authorized the resumption of the activities. These cases are currently ongoing (discussion on the merits).

The injunction requested by FARN has a much broader scope than the Mar del Plata applications, since it is aimed at the suspension of Argentina's entire offshore development program.

On September 14, 2023, the intervening court (Federal Court on Administrative Matters N° 8) issued a ruling rejecting the injunction requested by FARN on the following grounds: (1) the Judicial Branch is not authorized to design public policies related to the development of the energy sector; (2) the analysis for granting injunctions against administrative acts is, as a principle, restrictive; (3) FARN failed to provide the preliminary evidence required for injunction measures to support the rights it invoked; (4) in connection with some of the ongoing projects challenged by FARN (Argerich and CAN_102 projects), environmental permits were issued following the procedures set forth under applicable law; (5) in connection with the ongoing CAN_100, CAN_108, and CAN_114 projects, the issue had already been resolved by the Federal Court of Appeals of Mar del Plata; (6) regarding other awarded projects, granting the injunction would imply disregarding the rights of the awarded oil and gas producers that have an interest in the claim but have not yet been called to intervene in it; and (7) granting the injunction would cause greater harm than rejecting it since it would lead to the complete suspension of oil and gas production in the Austral Basin (which accounts for approximately between 8% and 10% of Argentina's current natural gas production).

FARN appealed the lower court's ruling, and the Federal Government submitted the corresponding writs supporting the court decision and the request for Panel IV of the Federal Appeals Court on Administrative Matters to reject the appeal. As of the date of this report issuance of the appeals court's decision is pending.

Expiration of Hydropower Concessions—Extension and Suspension of the Transfer of the Hydropower Plants to the Federal State

In the context of the privatization of the energy generation sector during the 1990s, various hydrogeneration units were transferred to the private sector through 30-year concessions. These concession agreements establish that upon the expiration of the concession term, the assets must be returned to the federal State. The 30-year terms of the concessions awarded during the 1990s are set to expire in 2023 and 2024, with the first concessions expiring and reverting on August 11, 2023. These hydropower centrals account for approximately 4,000 MW of capacity and play a significant role in the supply of electricity in the country.

In early 2023, the Argentine Government announced that, upon expiration of the concession terms, the assets would be operated by Energía Argentina S.A. (ENARSA), a state-owned energy corporation created in 2004. This decision was challenged by different provinces and energy-related entities.

LATIN AMERICA
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On July 10, 2023, Resolution SE N° 574/2023 was issued, stating that, in order to preserve the safety of assets and individuals, the private concessionaires should continue operating the hydropower centrals (with the supervision of ENARSA and the Provinces of Río Negro and Neuquén) for a term of 60 days, extendable for an additional 60-day term. Subsequently, through Resolution SE N° 815/2023 (published on October 9, 2023) the Government further extended the private concessionaires' operation by an additional 100 days. This term expires following the change of administration that will take place in Argentina on December 10, 2023. The approach to be followed by the new administration remains uncertain.

Call for Expressions of Interest to Expand the High Voltage Transmission System

On July 6, 2023, the Argentine Government published Resolution SE N° 562/2023, whereby it called for the submission of non-binding expressions of interest to expand the high voltage transmission system.

In particular, the expressions of interest were solicited for projects aimed at expanding transmission capacity for new power supply projects in high-demand areas (with the Argentine Government co-financing up to 50% of the required investment) and providing energy to off-grid mining projects (to be entirely funded by the private sector).

This measure was issued in response to Argentina's urgent need to expand the power transmission grid to facilitate the development of new energy generation projects, including renewable energy. The deadline for submitting expressions of interest expired in early October 2023.

As of October 31, 2023, the Government had only reported that 20 expressions of interest were submitted, as follows: one proposal exclusively linked to transmission capacity, four proposals related to transmission capacity expansion for mining demand, 12 proposals linked to transmission capacity for renewable generation, and three proposals relating to transmission capacity linked to renewable generation and mining demand. However, no information had been published as of such date in connection with the specifics of each project.

Extension of the PAIS Tax Payments of Imports of Goods and Services Generally—Exceptions for Energy Projects

In December 2019, in an effort to deter the purchase of foreign currency and, at the same time, avoid further devaluating the Argentine peso, the federal Congress passed Emergency Law N° 27,541, which, inter alia, created a tax applying to the purchase of foreign currency in the Argentine official foreign exchange market (*mercado libre de cambios* or "MLC") for certain purposes (known as the "Tax for an Inclusive and Supportive Argentina," or in Spanish "*Impuesto por una Argentina Inclusiva y Solidaria*," the (PAIS Tax).

In July 2023, faced with a challenging macroeconomic situation and foreign exchange deficits, the Argentine Government once again utilized this tax to increase the cost of foreign currency purchases while not allowing for an official devaluation of the Argentine peso. It should be noted that the Government is maintaining the official foreign exchange rate between the US dollar and the Peso frozen at an artificially low rate.

In this regard, through Decree N° 377/2023 (published in the Official Gazette on July 25, 2023), the Argentine Government exercised certain powers delegated through Law N° 27,541 and expanded the application of the PAIS Tax to the purchase of foreign currency through the MLC for the payment of imports of goods (at a rate of 7.5% of the value of the payment) and services (at a rate of 25% of the value of the payment) generally. Decree N° 377/2023 stated that the tax would not apply to payments for the purchase of "goods related to the generation of energy, in the terms approved by the Energy Secretariat."

In this regard, through Resolution SE N° 671/2023 (published in the Official Gazette on August 11, 2023), the payment of imports of fuels and of goods needed for the commissioning of the Néstor Kirchner gas pipeline and the reversion of the Northern gas pipeline were exempted from the application of the PAIS Tax. A few days later, the Energy Secretariat issued Resolution N° 714/2023 (published in the Official Gazette on September 1, 2023), exempting from the tax payments of imports of goods needed for power generation projects. In the case of renewable energy generation projects, in order to benefit from the exemption, the project must be included in the list of exempted projects approved by the resolution.

Decree N° 377/2023 had a negative impact on the energy sector, significantly increasing the costs of energy projects. This is particularly problematic since local projects largely rely on imported goods and services rendered by foreign suppliers. Energy companies from all sectors opposed the measure and demanded that broad exemptions be approved.

Unfortunately, the exceptions approved by the Energy Secretariat are very limited and insufficient. Notably, they do not cover imports of goods and services for the exploration and production of oil and gas, even though the development of Vaca Muerta and Argentina's offshore exploration and production program are essential for the country's economy and balance of payments.

Approval of Energy-Transition Federal Plans and Strategies

During the second half of 2023, the Argentine Government approved several official documents and strategies related to energy transition in Argentina.

On July 7, 2023, through Resolution SE N° 518/2023, the Energy Secretariat approved the "Guidelines and Scenarios for the 2030 Energy Transition," highlighting the fact that Argentina's energy transition should rely largely on natural gas as a transition vector and a relevant source of funding of the investments needed to accomplish the transition. On the same date, and with a similar focus, through Resolution SE N° 517/2023, the Energy Secretariat approved the Energy Transition Federal Plan 2030.

Finally, on September 12, 2023, Argentina's Federal Strategy for the Development of the Hydrogen Economy was presented. As part of this strategy, the Argentine Government conducted a Strategic Environmental Assessment of hydrogen development, focusing on the potential impacts of future blue and green energy projects in the Provinces of Buenos Aires, Neuquén, Río Negro, Chubut, Santa Cruz, and Tierra del Fuego.

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Inés Agüero Ovejero, Reporter

Latest Major Modifications to Mining Legal Framework in Argentina

Canon Mining Fees

On July 13, 2023, with the enactment of Resolution Nº 90/2023, the National Secretariat of Mining established that canon mining fees will be updated annually through a December resolution. The Directorate of Federal Mining Affairs will prepare a technical report establishing the updated fee value based on the interannual variation of the Consumer Price Index (CPI) as prepared and published by INDEC (National Institute of Statistics and Censuses).

National Program for the Systematic Disclosure of Mining Activity

Resolution Nº 96/2023 of the National Mining Secretariat of the Ministry of Economy, published in the National Official Gazette on July 8, 2023, created the National Program for the Systematic Disclosure of Mining Activity (ProNDSAM). This program aims to enhance the systematic disclosure of mining information and regulate the operation of the Information System Open to the Community on Mining Activity in Argentina (SIACAM). It also seeks to align with international standards for information disclosure within the mining sector, standardizing the publication of monthly and weekly reports, as well as updates on project portfolios. These reports will include information on exports, employment, international prices, and the progress of mining projects.

This program replaces the Argentine Mining Information Center (CIMA).

Preferential Exchange Rate for Mining Exports

Effective October 18, 2023, the Mining Secretariat, through Resolution Nº 163/23, incorporated lithium, borates, lime, and other minerals in the regime allowing these minerals to be exported at a preferential exchange rate. Of these exports, 75% must be settled through the Free Exchange Market, with the remaining 25% through the "blue chip swap" (*contado con liquidación*).

To qualify for this exchange rate, among other guidelines, exports must have a settlement date between October 2 and 20, 2023, inclusive.

This resolution adds strategic minerals to those already recognized by Joint Resolution Nº 1/2023 of October 10, 2023.

CFI Credits for Mining Suppliers—Province of Salta

Provincial Decree Nº 478 of the General Secretariat of the Government of Salta, published in the Official Gazette of Salta on September 8, 2023, approves the "CFI Credits for Mining Suppliers" agreement between the Federal Investment Council and the Government of the Province of Salta. The objective is to provide financial assistance to mining suppliers, particularly micro, small, and medium-sized companies located in the Province of Salta that have registered in the Provincial Registry of Local Providers of Mining Companies. The assistance aims to support investments in fixed assets and associated working capital. For this purpose, the Federal Investment Council will make available up to ARS$150 million, with an application deadline of December 31, 2023.

Provincial Registry of Local Mining Providers—Province of Jujuy

On August 18, 2023, Provincial Decree Nº 8854-DEyP/2023 of the Province of Jujuy was published in the Official Gazette of the Province of Jujuy. This decree creates a Provincial Registry of Local Mining Providers and imposes conditions on mining producers for the provider contracting regime. It mandates that producers must contract works, goods, supplies, or services rendered by local providers registered in the Registry, accounting for no less than 75% of the total annual amount contracted. The decree also outlines penalties for non-compliance, including suspension or exclusion from the Registry and monetary fines.

Modification to Mining Procedure for "Third-Category Minerals"—Province of Mendoza

On July 14, 2023, the Ministry of Economy and Energy of the Province of Mendoza issued Resolution Nº 31/2023, regulating the procedure for Environmental Impact Reports pursuant to Law Nº 8434. This applies once the file is submitted to the Mining Notary's Office for projects involving the exploration, extraction, selection, crushing, and milling of third-category minerals.

First Export of the Cauchari-Olaroz Project

Minera Exar, the mining project jointly formed by the Canadian company Lithium Americas, the Chinese company Gangeng Lithium, and the state-owned company JEMSE from Jujuy, marked a significant milestone with the first export of lithium carbonate. The Cauchari-Olaroz project initiated its production stage in July 2023, becoming the third operational project in Argentina. This year, production is expected to reach 10,000 tons, with plans to reach the plant's total installed capacity of 40,000 tons by the first quarter of 2024, effectively doubling the current production capacity in Argentina.

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its exploration into the energy potential of green hydrogen. The central government, through its Ministry of Hydrocarbons and Energy, together with the Inter-American Development Bank (IDB), has promoted the Virtual Workshop "Green Hydrogen Technologies for Decarbonization," where regional advances and projects in the field of alternative energies were presented. In that respect, the Minister of the sector stated that within the Bolivian energy plan, the introduction of green hydrogen and the construction of an Alternative Energy Center were planned. *See* https://www.mhe.gob.bo/2021/02/27/bolivia-impulsa-un-plan-para-la-generacion-de-hidrogeno-verde-rumbo-a-la-transicion-energetica/. Likewise, in July 2023, the "Technical Workshop on Green and Low Carbon Hydrogen" was held, with support from the British Embassy in Bolivia, facilitating the sharing of knowledge by experts from the United Kingdom. *See* https://www.mhe.gob.bo/2023/07/08/expertos-del-reino-unido-compartieron-sus-progresos-en-hidrogeno-verde/. Indeed, this is how work has been done on the "roadmap" for green hydrogen supported by a study that analyzes the areas with the greatest production potential, as well as its profitability and sustainability. According to the Vice Minister of Alternative Energy, this roadmap should have been completed in September 2023. *See* https://www.la-razon.com/energias-negocios/2023/07/07/bolivia-apronta-su-ingreso-en-la-ruta-del-hidrogeno-verde/.

Afterward, between November 2022 and January 2023, the Bolivian public electricity company, ENDE, launched a tender to carry out a green hydrogen production study for electricity generation in Cobija, the capital of the department of Pando, located in the northwest area of the country. This alternative fuel would be used in the Bahía thermoelectric plant in Cobija. However, after two void declarations, the process reached the third call in January 2023, about which there is no further infor-

mation. *See* https://www.bnamericas.com/es/noticias/estudios-de-hidrogeno-verde-en-bolivia-sufren-nuevo-reves.

A third actor interested in this topic is the Autonomous Departmental Government of Oruro, which aims to implement a green hydrogen and ammonia plant. *See* https://www.oruro.gob.bo/proyectan-implementacion-de-planta-de-hidrogeno-verde-y-amoniaco-en-oruro/. In May 2022, they promoted the "1st International Forum on Hydrogen and Green Ammonia," with the participation of experts in order to answer doubts about this energy alternative. *See* https://elfulgor.com/index.php/noticias/oruro-page/oruro-organiza-foro-internacional-sobre-hidrogeno-verde-para-su-posterior-produccion. Oruro's solar energy potential makes it a key location for green hydrogen production. "In Bolivia, the solar irradiation that we have in the highlands is easily 40% more than what exists in Australia and anywhere else in the world. So, we are trying to take advantage of this," said the manager of the Bolivian company leading the project, on the occasion of said Forum, adding that:

> We have been doing engineering studies in recent months, and we are starting with a new stage of detail engineering, to produce a plant and, the result is that we can produce this at efficiency rates that are the highest in the world. So for that reason, basically, more will be done in this region of the world, than in this region of Bolivia.

"Chuquisaqueños Bet on a Multimillion-Dollar Plant in Oruro," *Diario Correo del Sur* (May 16, 2022).

Departmental Law Nº 221/2022 and the Need for Special Legislation That Complements the Process

However, for Bolivia to be able to produce green hydrogen, taking advantage of its high potential for the generation of solar energy, initiatives by both the Central Government and the Departmental Government of Oruro, in addition to the necessary technical studies, must be supported by legislation. This will enable the development of such projects, especially when significant investment and legal security are required for potential investors.

Along this line, the first to take the initiative has been the Departmental Government of Oruro which, through Departmental Law Nº 221 issued on November 16, 2022, has resolved "to declare the implementation of policies of strategic interest and departmental priority, plans, programs and projects for the generation of solar energy and green and renewable energy (hydrogen and green ammonia) in the territorial jurisdiction of the Department of Oruro," entrusting its Executive Body with the task of "carrying out the necessary steps before national and international bodies to obtain the necessary economic resources that enable the fulfillment of the objectives of this law." Departmental Law Nº 221, arts. 1, 2.

Thus, although through this Law, the Government of Oruro has taken the first step to enact legal instruments that allow it to direct the pertinent steps to convert said Department into a producer of green hydrogen, it is important to have special legislation that regulates the production, storage, transportation, marketing, and use of this chemical component.

Existing Legal Framework

Bolivia's existing legal framework includes guidelines that will facilitate the advancement of green hydrogen production. The Political Constitution of the State, approved in 2009, establishes the central level of the State's exclusive jurisdiction (that is, it has legislative, regulatory, and executive powers, and can transfer and delegate the latter two) over strategic natural resources, which include minerals, electromagnetic spectrum, genetic and biogenetic resources, and water sources. *Id.* art. 297, ¶ I - b, art. 298, ¶ II - 4. It also provides that the central level of the State and the autonomous territorial entities will concurrently exercise jurisdiction over the promotion and management of hydraulic and energy projects. *Id.* art. 299, ¶ II - 7.

Additionally, the Political Constitution establishes the concept of natural resources, including minerals, hydrocarbons, water, air, soil, subsoil, forests, biodiversity, the electromagnetic spectrum, and other elements and physical forces susceptible to use, being of direct, indivisible, and imprescriptible property and domain of the Bolivian people. The State is responsible for their administration based on the collective interest. The State also grants rights of use and exploitation of other natural resources. *Id.* art. 348, ¶ I, art. 349, ¶¶ I, II.

With regard to water resources, the constitutional norm provides that the State must protect and guarantee the priority use of water for life, being its duty to manage, regulate, protect, and plan the appropriate and sustainable use of water resources, with social participation, guaranteeing access to water for all its inhabitants. It also provides that it will be a special law that will establish the conditions and limitations of all uses, identifying fossil, glacial, wetland, underground, mineral, and medicinal waters as priorities for the State, entrusting it with the task of guaranteeing their conservation, protection, preservation, restoration, sustainable use, and comprehensive management. *Id.* art. 374, ¶¶ I, III.

Finally, regarding energy, the constitutional norm establishes, first of all, that the different forms of energy and their sources constitute a strategic resource, their access being a fundamental and essential right for the comprehensive and social development of the country. Secondly, it points out that the development of the energy production chain in the stages of generation, transportation, and distribution is the exclusive power of the State (that is, it exercises the powers of legislation, regulation, and execution and cannot transfer or delegate them), through public, mixed companies, non-profit institutions, cooperatives, private companies, and community and social companies, with social participation and control. The energy production chain may not be subject exclusively to private interests nor may it be concessioned, and private participation will be regulated by Law. Thirdly, it provides that the State will develop and promote research and the use of new forms of alternative energy production compatible with environmental conservation. *Id.* art. 378, ¶¶ I, II, art. 379, ¶ I.

This Constitutional framework is complemented by the following important laws:

- Law N° 031 of July 19, 2010: Framework Law of Autonomies and Decentralization "Andrés Ibáñez," which with respect to energy, provides that the distribution of powers between the central level of the State and the autonomous territorial entities in matters of energy and its sources must be regulated by a sectoral law at the central level of the State, which will define the policy, planning, and regime of the sector. (Article 97).
- Law Nº 300 of October 15, 2012: Framework Law of Mother Earth and Comprehensive Development to Live Well, which with respect to energy, provides that they constitute bases and guidelines for living well, the establishment of the energy policy, and the measures to achieve the gradual change of the energy matrix coming from non-renewable natural resources through the gradual substitution of liquid fuels for natural gas, as well as the gradual increase of renewable energies to

replace those coming from non-renewable resources, such as developing plans and programs for the generation of alternative renewable energies and incentives for domestic production and use, prioritizing energy, solar and wind, and micro-hydroelectric plants and national energy savings. (Article 30).

- Law N° 516 of April 4, 2014: Investment Promotion Law. It establishes the general legal and institutional framework regarding the promotion of investments within Bolivia, establishing the mechanisms and conditions for investment. It is applicable to both Bolivian and foreign investments that are made in the national territory, intended for any economic sector in the country and implemented through the business and contractual forms permitted by current regulations, observing the particularities referring to the exclusivity of the State through public entities over the strategic sectors established in the Political Constitution, among which is the energy sector, but also recognizing the investment made by private initiative as long as it contributes to economic and social development, and to the strengthening of the economic independence of the country, noting that investors will be able to develop economic activities in strategic sectors, subject to the rights that the State grants for this purpose within the framework of the rules and policies of economic and social development of the country. (Articles 1, 2, 6, 7, 9, and 11).

The described existing legislation itself speaks of laws that must be issued on the issue of water regulation and on the issue of the production of alternative energies and the participation of private companies in energy matters. Consequently, as green hydrogen is a key piece of the Bolivian energy transition, the authorities at the central and departmental levels will need to conclude the design of the green hydrogen roadmap, including public policies and special regulations. The specific definition of the nature of green hydrogen (whether as energy, fuel, etc.) will guide its subsequent legal treatment.

Mattías Garrón, Reporter

Bolivia's New Era for Mining Through the Mining Production Agreement Still Pending

Since 2016, in Bolivia there has been a shift in the contractual relationship between the Bolivian Mining Corporation (COMIBOL), a state company, and the private and cooperative mining productive actors.

Although the regulation that approved the Mining Production Contracts (MPC) was issued as a political measure aimed at annulling the contracts that the mining cooperatives had with private companies, Law Nº 845 gave life to a new contractual framework for the development of mining activities in mining areas under control of COMIBOL.

In the broadest sense, this type of contract provides for the performance of mining activities in COMIBOL areas under the premise that the state entity does not yield "ownership" of the area and the counterparty must determine as compensation a percentage of economic participation in its favor, which will be calculated on the gross sale value.

From a more specific point of view, this type of contract has the following characteristics: (1) a percentage of COMIBOL's economic participation must be established, (2) may have a duration of 15 years and may be extended only once for a similar term, (3) they must contain similar clauses to the Mining Administrative Contracts, and (4) legislative approval is required.

The MPC should replace lease contracts and take a leading role in state mining; however, the procedure established by the regulation provokes that this type of contract is treated in a very bureaucratic and complex manner so that, once signed by COMIBOL and the other party, it has legal effects and is opposable to third parties. The most tedious part of the entire process is undoubtedly the legislative approval of the contract, given that there are several filters to reach this stage and once in the legislature, treatment of the law that approves the MPC must be included in the legislative agenda; the latter is already beyond the control of COMIBOL and the executive body.

Regarding the contract as such and its approval by COMIBOL, the biggest challenge is reaching consensus or seeking acceptance of COMIBOL's percentage of economic participation. Both the law and the regulations applicable to the MPC do not determine an estimated range or a procedure for setting this percentage, being ultimately a discretionary decision by the state company that may or may not accept a proposal from the private counterpart. This detail means that the contracts have no guidelines or parameters that address the feasibility of the project in its entirety and not only reflect the economic benefit of COMIBOL. From a technical-legal point of view, the discretion of the percentage within the MPC can lead to scrutiny in the long run, given that if the bar is set too high, i.e., 10% due to applicable administrative principles, it would be sought that all contracts satisfy a similar percentage, inducing that the case-by-case analysis would be almost nullified.

Contrary to the above, through a Supreme Decree it was established that the mining production contracts between COMIBOL and the mining cooperatives have a fixed, predetermined, and non-negotiable percentage of 1%. Clearly, this difference with private mining operators is substantial when requesting an MPC from COMIBOL, given that the "rules of the game" in the case of cooperatives are not subject to discretion and are non-negotiable.

In sum, the MPC was inserted within the national legal framework, but its application has been hampered—particularly for private mining operators—due to a long procedure and the asymmetries regarding the percentage of participation of COMIBOL among the contracts it signs with cooperatives and private mining.

The great challenge of this type of contract by the state will be in the simplification of the procedure, even giving deadlines for legislative approval, in order to generate greater legal certainty. Likewise, in terms of COMIBOL's economic participation, a range of percentages could be set for the private sector, prioritizing the project's feasibility while accounting for all national taxes and state fees required of private mining operators.

Finally, an additional observation is the maximum term established, given that, unlike the Mining Administrative Contract (AMC), the MPC may have a maximum duration of 30 years—including its renewal—a similar term to that of an AMC, except that the latter has the possibility of being extended for the same period, that is, 60 years in total. This point will generate debate once the MPCs, none of which have been legally approved to date, become effective after legislative approval.

Fueling the Future: Hydrocarbons in Bolivia

The hydrocarbons trajectory of Bolivia traces back to the latter half of the nineteenth century when the initial oil concessions were granted to European investors. Since then, Bolivia has faced numerous challenges concerning the ownership and management of this valuable natural resource. Despite fluctuations, hydrocarbons remain pivotal for the country, both economically and industrially, given their crucial role in the global market.

A pivotal juncture in Bolivia's hydrocarbon history materialized during the 1950s when the nation not only fulfilled its domestic demand but also achieved a production surplus in hydrocarbons. Consequently, Bolivia stepped onto the international stage as an exporter of oil and natural gas. By the late 1960s, the enactment of the General Hydrocarbons Law paved the way for natural gas exports to Argentina, marking a significant milestone in the country's economic and energy history.

More recently, the 2006 nationalization of hydrocarbons through Supreme Decree Nº 28701 of May 1, 2006, marked a major shift in resource management. This era saw a surge in hydrocarbon production and sales, generating $38 billion in revenue.

However, recent challenges in public and private investment in the sector, particularly in the exploration, location, and study of new deposits, have led to a decline in production, notably in the case of natural gas, plummeting to 37.2 million cubic meters per day. This downturn threatens Bolivia's position in the Brazilian market and could impact Bolivia's economy.

In response, measures are being taken to increase and ensure domestic hydrocarbon production. Yacimientos Petrolíferos Fiscales Bolivianos (YPFB), the state-owned company, notes that nearly half of Bolivia's territory has significant hydrocarbon potential, with an estimated 151 trillion cubic feet of natural gas distributed across 198 exploration areas. The state is prioritizing the consolidation and exploitation of this potential. Through YPFB, an exploratory route has been designed, covering 18 exploration and exploitation projects with an estimated investment of $324 million. Furthermore, there is a possibility of increased foreign investment in the country. Earlier this year, the president of YPFB emphasized the importance of investor participation in exploration activities. This materialized in the signing of a significant Petroleum Services Contract with Vintage Petroleum Bolivia LTD, representing a substantial investment of $504 million.

These efforts reflect Bolivia's commitment to optimizing its hydrocarbon wealth, stimulating economic growth, and fostering the sustainable development of the nation. Balancing investment, resource utilization, and resource conservation is a key challenge. Addressing this challenge will involve fulfilling the financial requirements for exploring new hydrocarbon reservoirs and developing vital infrastructure in emerging exploitation regions. This, in turn, substantially increases the opportunities for potential regulatory adjustments in the sector, aimed at enticing foreign investments over the medium term.

BRAZIL

Marina Diniz Cândido de Araújo & João Henrique de Carvalho Raso, Reporters

Brazilian Effort to Create a Regulation to Combat Money Laundering and Financing of Terrorism for the Gold Chain: ANM Resolution 129/2023 and the "Gold Law"

In February 2023, when news about illegal gold mining and extraction on indigenous lands located in the Brazilian North Region, especially in the Yanomami Reserve, was making headlines in national and international media, Resolution 129/2023 (Resolution 129) was published by the Brazilian National Mining Agency (ANM).

Aimed at addressing anti-money laundering, counter-terrorism financing, and the proliferation of weapons of mass destruction, Resolution 129 imposes a series of obligations on miners of precious stones and metals related to developing anti-money laundering and counter-terrorism financing programs, following the provision outlined in articles 10 and 11 of Federal Law Nº 9,613 of March 3, 1998.

These obligations can be divided into two main categories: (1) those applicable to individuals and companies of all sizes and (2) those applicable to individuals and companies of medium or large sizes.

In the first category of obligations, the following must be implemented and adopted:

- Anti-money laundering policies that include at least (i) controls and due diligence procedures for customer and other transaction parties' identification; (ii) identification of politically exposed persons (PEPs); (iii) identification of individuals subject to United Nations Security Council sanctions; (iv) proper record-keeping of transactions; (v) monitoring, selection, and analysis of suspicious or unusual situations; and (vi) reporting to the Brazilian Financial Activities Control Council (COAF), the Brazilian financial intelligence unit.
- Customer identification procedures to verify the authenticity of their identity, collecting specific identification and qualification data for individuals and legal entities, including whether they are PEPs, up to the ultimate beneficiary of the operation.
- Maintenance and storage of records of all precious stones and metals trading transactions with minimum data to describe and identify the operation and with whom it was conducted.
- Monitoring, selection, and analysis procedures of transactions to identify suspicious money laundering, terrorism financing, and proliferation of weapons of mass destruction situations, allowing the detection of transactions that deviate from the standard regarding payment method, value, or any market practice incompatibility.
- Procedures to get to know employees, partners, third-party service providers, and relevant business partners to ensure authenticity.

Furthermore, in the general obligations category, Resolution 129 also mandates reporting transactions to the COAF. Reporting should occur both when identifying a suspicious operation, either by the client or based on the characteristics of the transaction, and in cases of multiple transactions by the same client within a month involving cash payments or receipts equal to or exceeding BRL$50,000 or its equivalent in another currency,

including the purchase or sale of movable or immovable property. Additionally, companies should annually send a statement of no suspicious operations to ANM when no suspicious operations are identified.

In the second category, applicable only to medium- and large-sized individuals and companies, Resolution 129 specifies an enhanced anti-money laundering program and governance, making it compatible with the volume and scale of their operations and the associated risks while observing minimum parameters and guidelines. This includes defining roles and responsibilities, procedures for assessing new products and services, hiring personnel, and regularly reviewing compliance with the implemented policies and procedures.

Resolution 129 also includes penalties for non-compliance with the established obligations, including warnings, fines of up to BRL$20 million, temporary disqualification of up to 10 years from holding positions in regulated sectors, and the revocation or suspension of authorization to engage in activities, operations, or business.

In August 2023, ANM, through the publication of Resolution 138/2023, extended the deadline for compliance with the new obligations for medium- and large-sized individuals and companies until January 1, 2024.

In an increasingly global context, companies have been seeking to ensure that they do not engage in, or at least shield themselves from, business dealings involving criminal activities, human rights violations, the use of forced labor, child labor, pollution, money laundering, and terrorism. In this regard, Resolution 129, in line with globally adopted practices for dismantling illicit activities, brings transparency to transactions, following the principle of "follow the money."

Another recent update regarding gold mining in Brazil, and still in connection to the series of illegal gold mining operations that have been dismantled in the country in the last couple of years, is the Brazilian Supreme Court ruling that declares unconstitutional the presumption of legality concerning gold origin. According to this court's ruling, the burden of proof lies within the individuals involved in the gold mining and transportation activities, obligating them to demonstrate the gold extracted or transported has been legally obtained.

Previously, there was a presumption of legality, which meant individuals were not required to provide evidence regarding the legality of the gold they were extracting or transporting.

In connection with this ruling, the Brazilian Federal Government sent to Congress in June 2023 the so-called Gold Bill (Projeto de Lei do Ouro), which aims to update the regulation surrounding gold mining activities in Brazil.

The Gold Bill is still under discussion in Congress. Thus, with the new ruling from the Supreme Court, it is expected the bill might include stricter measures to ensure legality and traceability of gold by incorporating provisions that require individuals involved in gold mining and transportation to provide documentation and evidence attesting its legality.

Also, it is expected that the bill will include stricter licensing requirements, enhanced monitoring and traceability systems, and increased penalties for illegal activities, all of which are connected to the sector's commitment to combating illicit gold mining and promoting responsible and sustainable practices in the industry.

CHILE

Joaquín Corvalán Azpiazu, Reporter

Proposed New Constitution Concerning the Statute of Natural Resources, Environment, and Indigenous Rights

Constitutional Context

In Vol. 1, No. 1 (2023) of this *Newsletter* we commented that, on September 4, 2022, the New Constitution Project, elaborated during the years 2021 and 2022, was rejected by 62% of the voters. Consequently, and to date, the 1980 Constitution remains in force in Chile, substantially reformed in 1989 and 2005, among dozens of other modifications.

However, we also note that, given the rejection of the aforementioned project in 2022, a New Constituent Process "2.0" was initiated in Chile. For this purpose, a Commission of Experts—prominent jurists in the field of constitutional law—met and prepared a Preliminary Draft of a New Constitution and submitted it to the Constitutional Council—a democratically elected body—which modified the Preliminary Draft presented by the Commission of Experts. As of October 31, 2023, the final version of the Constitutional Proposal is already available and will be submitted to a plebiscite on December 17, 2023.

We will now review the main elements of the constitutional status of natural resources, environment, and indigenous rights that the New Constitutional Project "2.0" would be offering to Chile.

Content of the Norms Contained in the Proposed New Constitution, Concerning the Constitutional Statute of Natural Resources, Environment, and Indigenous Rights

Indigenous Law

Chapter I of the Proposed New Constitution (Foundations of the Constitutional Order) recognizes indigenous peoples as part of the Chilean Nation, which is one and indivisible, and that the State must respect and promote their individual and collective rights guaranteed by the Constitution, laws, and international treaties ratified by Chile and in force (Art. 5 Number 1). Interculturality is also recognized as a value of the ethnic and cultural diversity of the country, and intercultural dialogue is promoted under conditions of equality and reciprocal respect (Art. 5 Number 2).

In Chapter IV of the Constitutional Proposal (National Congress), it is established that the law may establish mechanisms to promote the political participation of indigenous peoples in the National Congress (Art. 51). In short, in the matter of indigenous quotas, the Constitutional Proposal gives the decision to the legislator, in an enabling manner.

Chapter VIII (Regional and Local Government and Administration) also delegates to the legislator the task of establishing mechanisms for the respect and promotion of the rights of indigenous peoples in the regions and communes, with special emphasis on those with a significant presence of indigenous population (Art. 127).

Finally, in the Transitory Provisions of the Constitutional Proposal, it is provided that within two years following the entry into force of the New Constitution, the President of the Republic shall submit draft laws regulating the special statutes for the government and administration of Rapa Nui and the Juan Fernández Archipelago, with the requirement to incorporate a prior process of indigenous participation and consultation with the Rapa Nui People (Thirty-Ninth Transitory Provision).

Natural Resources and Energy

Right to water and sanitation: The Constitutional Proposal innovates by establishing the right to water and sanitation (Art. 16 Number 30). Additionally, with respect to the ownership of water, article 16, number 35, letter i) of the Constitutional Proposal states that waters are national property of public use, belonging to the whole Nation, without prejudice to the fact that water use rights may be granted, which confer to the holder the use and enjoyment of the waters, and allow him to dispose, transmit, and transfer such water rights. A constitutional action of protection is established in Art. 26 of the Proposal in order to guarantee and protect this right. Finally, the Twelfth Transitory Provision establishes that water use rights constituted, recognized, or regularized in accordance with the law shall be governed by the legal norms in force at the time of promulgation of the Constitution.

Mining: Article 16 number 35 of the Constitutional Proposal, when regulating the right of ownership, states that the State has absolute, exclusive, inalienable, and imprescriptible ownership over all mines, notwithstanding the ownership of natural or juridical persons over the land in the bowels of which they are located. The surface lands shall be subject to the obligations and limitations established by law to facilitate the exploration, exploitation, and benefit of such mines. However, the same numeral establishes that it will be up to the law to establish which substances may be the object of exploration or exploitation concessions, which will be granted by judicial decision, and that the property of the holder of the mining concession is protected. On the other hand, the Eleventh Transitory Provision deals with large copper mining and the companies considered as such, noting that such companies will continue to be governed by the constitutional rules in force at the date of promulgation of the Constitution.

Energy: The Constitutional Proposal, in Chapter XV (Environmental Protection, Sustainability and Development) establishes in a very general manner that the State has the duty to promote an energy matrix compatible with environmental protection, sustainability, and development (Art. 210). There is an additional mention of energy in article 113, when regulating the concept of critical infrastructure, noting that this is understood as that which is indispensable for the generation, transmission, transportation, production, storage, and distribution of basic services and inputs for the population, including energy within these basic services.

Environmental Protection

The most substantial change contained in the Constitutional Proposal is found in the creation of a special Chapter XV dealing with the "Protection of the Environment, Sustainability and Development," which does not exist in the current Constitution. This Chapter XV establishes the purpose of environmental protection and the duties of the State regarding the care and protection of the environment (Arts. 206 and 207); the right of access to justice, information, and citizen participation in environmental matters (Art. 208); the promotion of an environmentally sustainable energy matrix (Art. 210); and environmental institutions and environmental evaluation procedures (Art. 213); among other provisions. In other chapters of the Constitutional Proposal there are also provisions related to the environment, such as the duty of the State to protect the environment and promote sustainability (Art. 10); the right to live in a healthy environment free of pollution (Art. 16 Number 21); and the correlative constitutional action of protection contemplated in Art. 26 to make this right effective, as long as the illegal or arbitrary act or omission that causes deprivation, disturbance, or threat to this right comes from a determined authority or person (Art. 26).

Next Steps

On December 17, 2023, elections will be held to decide whether the Constitutional Proposal was approved or rejected by the citizens.

New Law That Creates the Biodiversity and Protected Areas Service and the National System of Protected Areas (Law Nº 21,600)

On September 6, 2023, Law Nº 21,600 was published in the Official Gazette, which creates the Biodiversity and Protected Areas Service and the National System of Protected Areas. This law also establishes a series of amendments to Law Nº 19,300 of General Bases of the Environment, and repeals Law Nº 18,302, which creates a National System of State Protected Wildlife Areas (Art. 143).

The purpose of Law Nº 21,600 is the conservation of biological diversity and the protection of Chile's national heritage, through the preservation, restoration, and sustainable use of genes, species, and ecosystems (Art. 1), establishing a series of guiding principles—such as coordination, hierarchy, non-regression, participation, precaution, responsibility, etc.—for all policies, plans, regulations, actions, and administrative acts that are issued or executed within the framework of this law (Art. 2).

Law Nº 21,600 creates the Biodiversity and Protected Areas Service, which will have legal capacity and its own heritage, and will be subject to the supervision of the President of the Republic through the Ministry of the Environment (Art. 4). In addition, this Service, despite having a National Director, will be territorially decentralized, creating Regional Directorates of the Biodiversity and Protected Areas Service, with a Regional Director in each of the country's regions (Art. 8). On the other hand, Law Nº 21,600 creates instruments for the conservation of species and their genetic variability, for the protection and sustainable management of wetlands (Art. 23), as well as a National Biodiversity Fund (Art. 46).

Regarding the National System of Protected Areas, Article 56 of the aforementioned Law establishes the following categories of protection: (1) Virgin Region Reserve; (2) National Park; (3) Natural Monument; (4) National Reserve; (5) Multiple-Use Conservation Area; and (6) Indigenous Peoples Conservation Area. A legal power is created for the Biodiversity and Protected Areas Service, related to the granting of concessions in these areas for activities of education, tourism, and scientific research (Art. 79); and another legal power is established related to the ability of the mentioned Service to supervise the compliance of the Management Plans of Protected Areas; to watch over the compliance of the concessions, permits, and any activity carried out in those areas (Art. 71).

Alejandro Montt, Reporter

New Bill to Enable the Energy Transition of the Chilean Energy Market

On July 10, 2023, the Chilean Government submitted to Congress a bill called "Energy Transition: Electric Transmission as an Enabling Sector" (Bulletin Nº 16,078-08) that amends the Decree with Force of Law Nº 4/2018 of the Ministry of Economy, Development and Reconstruction, corresponding to the General Law of Electric Services, in matters of energy transition,

and seeks to position electric transmission as an enabling sector for carbon neutrality.

The Bill goes hand in hand with Chile's goals of carbon neutrality by the year 2050 under the Framework Law on Climate Change. In this sense, the electricity sector, and in particular the transmission segment, must be an enabling sector, with transmission projects that are timely executed and resilient, in such a way that they adapt to temperature variations and can transport large volumes of renewable energy.

Therefore, the objective is to accelerate the participation of renewable and clean energies in the Chilean energy matrix, through a greater deployment of electricity transmission infrastructure through the following pillars: (1) efficient development of transmission works; (2) electricity sector and climate change; and (3) competition and promotion of storage.

The first pillar, "efficient development of transmission works," aims to improve the performance in the transmission tenders and reduce conflicts in the development of expansion works. In greater detail, it establishes the duty of the owners of the expansion works to carry out the tender process and development of the works; it incorporates a mechanism to review the value of the investment in the event of early termination of the contract awarded for the execution of the work, for justified reasons; and it incorporates a transitory mechanism to review the value of the investment for those works already awarded and that are currently paralyzed, whose contracts have been terminated early.

The second pillar, "electricity sector and climate change," establishes measures to give binding signals to the electricity transmission sector to comply with the goals and objectives of carbon neutrality and resilience by 2050 established in the Framework Law on Climate Change, as well as seeking to facilitate efficient planning of electricity transmission works.

The measures of this pillar have been structured in three areas:

(1) Energy planning and territorial impact: the long-term strategic planning process is reformulated, highlighting its territorial nature, introducing the National Energy Plan, introducing the Strategic Energy Plans in Regions (to be considered by the National Energy Plan), and strengthening the Electricity Generation Development Poles, moving to a regional and strategic scale.

(2) Enabling infrastructure for the energy transition: The guidelines of the Framework Law on Climate Change are incorporated into long-term energy planning, in order to establish a set of strategic transmission needs required to comply with the legal mandate to achieve carbon neutrality by 2050. Likewise, reforms are made to the transmission planning process, modifying the functions of the National Electric Coordinator and the Ministry of Energy, highlighting a complementary role between institutions and giving greater influence to the signals coming from the National Energy Plan and incorporating signals of resilience and adaptation to climate change. In addition, a new mechanism is incorporated to accelerate the execution of urgent and necessary expansion works for the electric system, excluding them from the transmission planning process. This mechanism constitutes an alternative to those already considered through the current article 102° of the General Law of Electric Services. Finally, extraordinary tariff revenues are modified in order to incorporate a new hypothesis of reallocation of tariff revenues to be able to respond to systemic situations of different kinds that generate congestion rents or extraordinary tariff revenues of the national transmission system, produced by the pronounced difference between the costs of energy withdrawal and the payment of energy injections in different substations of the network, as part of the spot market of the electric system. This measure seeks to address the distortions generated by congestion rents, due to the delay in the development of the transmission works necessary to bring renewable energies located in the north of the country to the central and southern areas.

(3) Operation of an electric system with low emissions: The propitiation of a system operation low in greenhouse gas emissions is included as a new principle in the coordination of the operation of the electricity system, to promote the technological adaptation to operate a highly renewable electricity system.

The third pillar, "competition and promotion of storage," recognizes the current particularities of the different segments of the electricity sector, so that regulation is in line with the characteristics of the market. Among the measures are: allowing companies to operate in different segments; excluding the obligation for distribution companies operating in isolated and medium-sized systems to have a single line of business, and replacing it with the obligation to keep separate accounting; and holding an international tender process to achieve a large-scale storage system that will mobilize an investment of close to US$ 2 billion, which will come into operation in the electricity system before 2026, in order to continue with the decarbonization process in Chile.

Additionally, the Bill contains measures that consider expediting the issuance of technical standards by the National Energy Commission when non-substantive and urgent modifications are required; incorporates incentives for compliance with electricity supply contracts for regulated customers; clears uncertainties regarding the participation of energy storage systems in the transmission sector; modifies the definition of peak power; and adjusts the procedure for the determination of preliminary transmission strips.

It should be noted that this bill is part of a set of measures announced by the government, and of a larger work schedule to be presented by the Ministry of Energy, which includes (1) short-term actions in administrative matters, (2) the enabling of storage in the coordination and operation regulations, (3) the opening of a technical debate with the support of the IDB on decarbonization that will allow the creation of a consensual roadmap in this area, and (4) the space for a more structural discussion of the Chilean electricity market.

COLOMBIA

Tomás de la Calle, Reporter

Legislating for an Energy Transition or for an Energy Disruption?

Introduction

The current Colombian president, Gustavo Petro, started his four-year term on August 7, 2022. One of the first tasks every new president must undertake is to present a National Development Plan (NDP) bill to Congress. Hence, it was passed into Law 2294 on May 19, 2023. Since it is customary to tag the

NDPs with fancy names, this one is no exception: “Colombia World Power of Life” (“*Colombia Potencia Mundial de la Vida*”).

Like any corporate plan, it contains both strategic and tactical objectives. The strategic ones consist of a series of general as well as specific statements, and not infrequently grandiose assertions. The tactical objectives are meant to be the translation of the strategic objectives into concrete figures that make up the investment plan of the quadrennium (i.e., 2023–2026) and is deemed as the “Multi-Year Investment Plan” (“*Plan Plurianual de Inversiones*”).

Since “energy transition” makes up for more than 50 entries in this NDP, the intent here is to review what it says about the extractive sector and, more importantly, what it does not say about the petroleum and mining sectors.

Former NDPs: 2015–2018 and 2019–2022

Regarding the petroleum sector, it had become customary up to year 2014 to set up very specific goals within every NDP in regards to exploration efforts. The typical four goals used to be: (1) the number of new exploration and production (E&P) licenses awarded (deemed as administrative or clerical effort, as opposed to the remaining three which are deemed to be field efforts); (2) the kilometers seismic acquired; (3) the number of wildcats drilled; and (4) the barrels of oil reserves incorporated (all of them referred to the four-year term).

President Santos’s NDP (2015–2018, Law 1753: “All for a New Country”) and President Duque’s NDP (2019–2022, Law 1955: “Pact for Colombia, Pact for Equity”) set up the goals displayed in the following table; such goals are compared with the actual results obtained at the end of their respective terms.

	New E&P Licenses (#)	Production (mb/d)		Seismic (km)		Wildcats (#)	
National Development Plan	*Actual*	**Goal**	*Actual*	**Goal**	*Actual*	**Goal**	*Actual*
Santos: 2015–2018	*7*	**1,148**	*822*	**94,261**	*75,117*	**496**	*148*
Duque: 2019–2022	*69*	**854**	790	**6,900**	*9,126*	**207**	*159*

Regarding “production” goals, Santos’s NDP referred to average production in 2018, whereas Duque’s NDP referred to the four-year term average (actual 2022 average production was 754 mb/d). Notice that these two NDPs did not set up goals regarding the number of new E&P licenses awarded, perhaps because there was a discussion about how meaningful this indicator actually was. It is not quite the same to award a license to ExxonMobil over an area of 1.167.882 hectares (*Tayrona*) than it is to award a 119-hectares license (*Los Hatos)* to a start-up oil company. Still, they would have been computed as two new E&P licenses. It must be said, though, that although no specific goals were set on this regard, the two governments expected to bestow new E&P licenses since they were instrumental to achieving the other indicators’ goals (i.e., seismic, wildcats, etc.).

Current NDP: 2023–2026

The current NDP (2023–2026) was enacted by Law 2294, which is 795 pages long. Additionally, there are another two documents that are deemed included in the Law since they complement it: the “Basis for the NDP” (345 pages) and the “Multiyear Investment Plan” (201 pages). Throughout the 1,341 pages there is not any specific goal set for crude oil or coal. Regarding energy, some general statements of the following kind are made:

- “With this, it is expected a productivity that promotes the sustainable development and competitiveness of the country, increasing wealth while being inclusive, progressively leaving behind dependence on extractive activities and giving way to a re-industrialized economy with new sectors supported by territorial potentialities in harmony with nature.” (page 2)
- “In this process of productive transformation, it is important to advance the internationalization of the economy, and thus the structure of exports is progressively reduced, as is the dependence on oil and coal. These exports must be replaced by national products with high added value.” (page 474)
- “The reduction of dependence on hydrocarbons and mining has to go hand in hand with an appropriation by communities of the rents generated by alternative energies.” (page 485)
- “The country’s energy and economic dependence on fossil fuels represents low competitiveness and accentuates vulnerability. An urgent response is required, which progressively leads to substantive changes in the modes of production and consumption. Conclusively, the financial surpluses from coal and oil will be used to make an energy transition that will lead us to a green economy. (page 586)
- “[Promotion of] Fair energy transition, democratization of energy generation and consumption, development of energy communities, promotion of clean energies (green hydrogen, wind, solar, among others) and strategic minerals.” (Such statement is repeated 34 times over the “Multiyear Investment Plan”)

There is a separate document prepared by the Ministry of Finance that is not part of the Law but served as a basis for its preparation. *See* Colombia Ministry of Fin. & Pub. Credit, “2023 Financial Plan Update” (updated Dec. 2022). It presents the assumptions regarding crude oil production and Brent prices over the four-year term of the NDP (i.e., 2023–2026). Although no explanation is offered about the rationality of such assumptions, it is remarkable the one-decimal-point “precision” at which they forecast! Based on such oil production and price they estimate the contribution the oil sector would represent to the central government income. Such contribution comes from oil taxes and the dividends the government receives from Ecopetrol (i.e., ~88% state-owned). Royalties are not computed in this calculation since they are paid to local governments, as opposed to the central government.

Conclusion

The lack of specific goals for the extractive sector within the NDP clearly indicates a deliberate policy to weaken this sector. Moreover, the President has expressed the intention of his government to award no new E&P licenses (a kind of goal of zero to this indicator). Besides, in August 2022 the new government submitted a bill intended at forbidding the exploitation of unconventional fields, deemed the “anti-fracking” bill, which will be passed into law very soon.

It is notable that (1) the National Hydrocarbons Agency (the upstream oil regulator in charge of awarding E&P licenses) is devoting its efforts to prepare and launch the first national offshore wind farm bidding round; (2) Ecopetrol’s labor union ex-

pressed their strong disapproval regarding the announced 2024 budget cuts in exploration and production areas from a former US$4.5 billion to a proposed US$2.5 billion; and (3) the Colombian Chamber of Goods and Services for Oil, Gas, and Energy has pointed out that drilling activity has shrunk from 149 drilling rigs in January 2023 to 124 in June 2023 (or -17%), with the resultant job losses estimated at 13,000.

So, if the purpose was to wither the extractive sector, it is in fact being achieved with extraordinary success. The thing is that Petro's government is going to enjoy the rents inherited from the past, but is going to leave a sector unable to continue providing the much-needed cash and foreign exchange required to, among other things, finance the energy transition; the security of supply is at risk.

Janine Acosta, Reporter

New Environmental Liability Law in Colombia

On September 13, 2023, Law 2327 of 2023 was issued, establishing definitions and management guidelines for environmental liabilities in the context of site contamination and other provisions.

Important Aspects of the Law

Law 2327 of 2023 defines "environmental liabilities" as "the environmental impacts caused by anthropic activities, authorized or not, cumulative or not, measurable, locatable and geographically delimitable, that generate risk to life, human health or the environment, and for whose control there is no environmental or sectorial instrument in force."

Article 4 of the approved law orders the creation of the National Committee for the Management of Environmental Liabilities, which will be responsible for the implementation and follow-up of the public policy ordered by this law, as well as ensuring the necessary inter-institutional coordination for the management of environmental liabilities, including the responsibilities that legally correspond to the environmental authorities, territorial entities, ministries, and other entities responsible for the formulation and execution of sectorial development policies.

Likewise, Article 6 mandates the creation of the Environmental Liabilities Information System, which will function as a single instrument for managing information on environmental liabilities and environmental damage. This information management instrument will register the location of the liabilities and those responsible for them.

In addition, Article 7 provides guidelines for environmental control and management by the environmental authorities through the environmental liabilities intervention plans. These instruments will contain the intervention measures of the same, oriented to the rehabilitation, remediation, restoration, or isolation of the area. The competent environmental authority and the sectorial authority may authorize coordinated exercises between those responsible for the intervention plan and the person responsible for the activity.

Article 8 establishes that in the event of an environmental liability, the competent environmental authority must proceed to identify the alleged generator and initiate the necessary actions for its intervention, without prejudice to the adoption of preventive and sanctioning measures. The same article mentions that the person responsible for the environmental liability will respond with its patrimony. Additionally, the article establishes that the competent environmental authority will take the necessary measures to identify the person responsible for the environmental liability, without ceasing in its search, based on the existence of a strict liability regime.

On the other hand, Article 9 mentions that in the event that an environmental liability is configured in those projects without an environmental instrument, the competent environmental authority may impose as an environmental management and control instrument the environmental liability intervention plan referred to in Article 7 on the areas suspected of being configured as environmental liability. For purposes of identification and configuration of the environmental liability, the sectorial authority shall provide support to the competent environmental authority.

Regarding the Liability of the Generator of the Environmental Liability

In this regard, it is necessary to make several comments. In the first place, it is the first law that regulates environmental impacts that do not have an environmental management instrument with which the impacts can be mitigated. Thus, the environmental impact caused by hydrocarbon spills due to terrorist attacks, irregular disposal and abandonment of medical/hazardous waste, or lead contamination in the air due to the production of metals that exceeds permitted levels are examples of environmental liabilities within the framework of this new law.

From the interpretation of the regulation, it is understood that the party responsible for the environmental liability may be (1) determined, (2) undetermined, and (3) without economic capacity. In this sense, the liability is attributable to the determined subject, which will be investigated by the environmental authority. The regulation is not clear in stating what will happen in terms of liability in case the subject is undetermined or does not have economic capacity.

Additionally, the competent environmental authority will take the necessary measures to identify the person responsible for the environmental liability on the basis of a strict liability regime. Thus, it is not evaluated whether the conduct was committed through fault or willful misconduct. It is presumed that the environmental liability was generated on the occasion of the development of a risky activity. Likewise, the intervention of environmental liabilities does not prevent the environmental authority from initiating an environmental sanctioning process under the terms of Law 1333 of 2009.

It is important to highlight that there is no consolidated precedent on liability. In this regard, the Constitutional Court in the judgment SU-455 of 2020, modified the structure of liability and established that the existence of indicators of liability is sufficient to prove the causal nexus. Likewise, it determined that the judge must presume the fault of the polluting agent given that the activities that imply a possible environmental impact must be considered as risky. On the other hand, the Council of State in a judgment on August 2, 2023, established that pollution in itself is not assimilable to environmental damage, since it is understood that in modern society any activity is inherent to the production of one or several pollution phenomena, when it is subject to administrative authorization. Therefore, whenever there is environmental damage there is pollution, but not whenever there is pollution there is environmental damage. Consequently, the Council of State departs from the initial interpretation of the Constitutional Court and omits the existence of indicators as an element attributing liability. Thus, the standard used by the Council of State to determine the liability of a polluting agent is much laxer.

In conclusion, it is not clear what standard of liability the environmental authorities will take into account to attribute liability under Law 2327 of 2023 on environmental liabilities. However, it is very important that companies put in place mitigation mechanisms in case they are faced with a potential environmental liability.

ECUADOR

Patricio Albuja, Reporter

Gas Flaring Regulation in Ecuador as Consequence of Constitutional Rulings

The Ecuadorean Constitution enacted in 2008 provided a new constitutional recourse called "*Acción de Protección*," which objective is to efficiently and immediately protect the rights of a citizen. The Constitutional Actions Law (*Ley Orgánica de Garantías Jurisdiccionales y Control Constitucional*) enacted in 2009 provided the limits for this constitutional action. Most notably, it may not be used when another judicial mechanism is available to protect a breached right adequately and efficiently. The scope of this constitutional action has been publicly debated, but the courts have erred on the side of rights' protection and thereby several constitutional cases have arisen against oil and gas companies in order to protect environmental and communal rights.

In the past three years, this constitutional recourse has been activated by communities living close to oil and gas operations aiming to stop gas flaring and requesting compensation alleging that such operations cause damage to the environment, and damage to their well-being.

In the two cases analyzed herein, the constitutional recourse was filed against the Ecuadorean State as well as against the operators of the oilfields. In regard to the procedural effectiveness of this constitutional recourse, the courts have interpreted this as an adequate and efficient procedure to prevent rights violations. The rulings for the constitutional actions are considered final judgments and no appeal or other judicial recourse stops the execution of the decisions. The lower court judge rulings and the court of appeals rulings under this constitutional procedure are immediately executable. No appeal nor the final recourse filed at the Constitutional Court *(Acción Extraordinaria de Protección)* shall stop the execution of the rulings from the date they were issued.

In regard to gas flaring, aside from the claimants' allegations of being harmful to the environment and to the community, it is important to provide context on how gas production is regulated under Ecuadorian law for crude oil operators. For international oil companies (IOC), holding an exploration and production (E&P) contract for crude oil, for any associated gas produced by these companies as consequence of their production operations, the law provides four alternatives: (1) request a E&P contract for gas production; (2) reinject the gas in an oilfield reservoir; (3) use it for self-consumption (usually for electricity generation for operations); or (4) flaring with a prior authorization of the Hydrocarbon Ministry. Usually, IOCs opt to use the associated gas for electricity generation and the remaining request the Ministry an authorization to flare it as it is not economically nor technically feasible.

A brief analysis follows of the most relevant constitutional cases regarding allegations against gas flaring activities; it is provided as it is important to address the current impact of such cases in the hydrocarbon industry and how it will affect IOCs in the upcoming years as gas flaring is a vital process of petroleum operations.

Petroecuador Case—Ruling Nº 21201-2020-00170

In 2020, nine girls who live close to the operation of one of the oilfields operated by Petroecuador filed a constitutional action in the town of Lago Agrio against Petroecuador and the State of Ecuador alleging that the gas flaring is a current and potential danger for their health.

In the County Court of Lago Agrio (*Unidad Judicial Familia, Mujer, Niñez Y Adolescencia Con Sede Cantón Lago Agrio De La Provincia De Sucumbíos*), the constitutional action was dismissed on the grounds that the claimants did not prove the breach of any constitutional right. In the Court of Appeals of Sucumbíos (*Sala Multicompetente de la Corte Provincial de Justicia de Sucumbíos*) the tribunal ruled in favor of the claimants on the grounds that gas flaring is proven to cause contamination and as such the rights to a healthy environment and free of contamination were breached.

When a court finds that constitutional rights are affected, it shall order reparations against the defendants, in this case against Petroecuador and the State.

The main reparations in this case are the following: (1) the Ministry of Hydrocarbons and the IOCs must prepare and keep yearly-updated a plan for the gradual and progressive elimination of traditional flares used for gas burning; (2) the elimination, within 18 months (until April 2023), of gas flares located in areas adjacent to populated centers; (3) progressive reduction of flares until their complete elimination by the year 2030; (4) the Ministry of Hydrocarbons may grant authorizations for gas burning in remote locations far from populated centers only when technology is presented that reduces environmental pollution or when the operators can prove that they have implemented new technology that uses the gas; and (5) the Ministry of Environment must develop an annual monitoring plan and verify the restoration of the natural environments in the surrounding areas.

As evidenced in the reparations above, as the State is a defendant, such reparations not only affect it and the National Oil Company, but also all of the industry as the obligations against the State imposed reduction of authorizations issued by the Ministry of Energy for gas flaring and the request of elimination of gas flaring for 2030.

International Oil Company (IOC)—Case Nº 22252-2021-00253

In 2021, a very similar constitutional action was filed against an IOC that holds an E&P service contract in an oilfield in Ecuador. It was a constitutional action filed against the company and the State by six people who live in a community close to an operation facility. In addition to contamination due to gas flaring allegations as in the Petroecuador case, in this case claimants included accusations of sound contamination produced by gas flares and the electricity generation plants.

The Court of Appeals of Orellana issued its ruling accepting the County Court's ruling that provided, most notably, the following reparations in favor of the claimants: (1) within one year of the date of the court of appeals ruling carry out actions aimed at isolating the noise from the generators; (2) within one year of the date of the court of appeals ruling eliminate the gas flares in the oilfield; (3) within one year of the date of the court of appeals ruling remediate, recover, and immediately restore the water sources, subsurface, and soil of the Virgen del Carmen community; (4) within six months of the date of the court of appeals ruling provide a health campaign in order to diagnose

and treat any illness of the community caused by the gas flares; and (5) issue public apologies.

Editor's Note: The reporters serve as counsel for the IOC defendant.

Consequences Derived from the Constitutional Rulings

From these rulings we can analyze that, despite the fact that the defendants in these cases comply with the environmental standards and obligations, the courts have ruled that compliance with the environmental regulations is not enough if a constitutional right is being breached. This apparent new standard makes it unforeseeable to determine when an operation conducted under legal parameters may affect a person's rights. Under the rule of law, environmental laws, regulations, and other technical national and international standards are deemed constitutional and are part of the legal structure of the State; therefore, if in compliance, there cannot possibly be a constitutional rights violation. Needless to say, that in accordance with the Constitution, oil and gas exploration and production is a permitted activity that can harmonically coexist with other rights such as environmental and health rights of the community, whilst complying with the regulations. The Constitutional Court will review these cases and the industry will look forward to its decision on how to understand these apparently conflicting rights.

As a direct consequence of the ruling against Petroecuador, the Ministry of Hydrocarbons issued in October 2022 the Regulation to Progressively Reduce Gas Flaring (*Reglamento Para Reducir Progresivamente la Quema Rutinaria de Gas Asociado En Tea*). This regulation contains important definitions and obligations for the oil companies in order to comply with the deadlines provided by the Petroecuador ruling. Specifically, it provides regulations to eliminate gas flaring in areas adjacent to populated centers before April 2023 and complete elimination of gas flaring by 2030. The regulation defined populated centers as a concentration of at least 20 contiguous, neighboring, or attached houses within 100 meters of the flares. The most notable obligation is the filing to the Ministry of Hydrocarbons of an annual reduction of gas flares plan that shall be submitted annually, and which is also now a new requirement for the flaring permit that is requested also annually.

An additional consequence of the Petroecuador case was the enactment on October 16, 2023, by the Ministry of Energy that regulated the use of associated gas in E&P activities, of Ministerial Decree N° MEM-MEM-2023-0021-AM (*Disposiciones Que Permitan El Aprovechamiento De Gas Asociado De Las Actividades De Exploración y Explotación De Hidrocarburos*). This regulation establishes that IOCs shall prioritize the self-consumption of associated gas for electricity generation and reinjection prior to transfer or marketing such associated gas. The latter—transfer and marketing of associated gas—may only be applicable after requesting an additional E&P contract as crude oil contracts do not allow IOCs to market nor transfer associated gas. Furthermore, this recent regulation provides that IOCs shall have priority when requesting permits to generate and sell electricity. Despite the good intentions of this regulation, two important questions are yet to be resolved by the Energy Regulatory Authority (*Agencia de Regulación y Control de Energía y Recursos Naturales no Renovables*) and to the Hydrocarbon's Vice Minister that shall enact additional regulations in order to implement the Ministerial Decree: (1) how these companies shall connect to the national power grid to sell the generated electricity especially since most oilfields are far from such grid, and (2) how will the State transfer property of the associated gas as it is state-owned when it is not used for self-consumption.

The Ministry of Environment, also as a consequence of the Petroecuador ruling, is currently drafting a regulation to comply with the obligation of an annual monitoring plan that will verify the restoration of the natural environments in the surrounding area. Such restoration and monitoring of the areas adjacent to the gas flares shall become a new burden to oil companies operating in Ecuador.

Ultimately, all these additional obligations that the oil companies will have to incur due to the Petroecuador ruling and to the new regulations can be studied as unforeseeable events that may trigger stabilization clauses reparations as they were not enforceable at the time the E&P agreements were executed. As such, this could grant the oil companies a right, either under the bona fide principle or in light of the stabilization clause of their contracts, to restabilize the contract equilibrium. Finally, if no agreement could be reached, it could potentially lead to claims against the Ministry of Energy especially since certain obligations may be impossible to comply with within the timeframe and since if complied with, oil production would not be feasible under such conditions (i.e., elimination of all gas flares within a year).

In regard to the consequences of the case against the IOC, no regulations have been enacted specifically. Most likely, more than specific regulations, the most important consequence would be the momentum effect of an unprecedented and irrational win in gas flaring cases that may be replicated against other IOCs.

Most importantly, we shall still wait and see the main consequence: how the State is planning to eliminate by 2030 all gas flaring. According to E&P technicians, gas flares are always required for a safe operation. The State has a challenge to either terminate E&P operations or find a solution and an interpretation that may allow it to juggle with this obligation as well as to keep a safe operation whilst avoiding litigation from its contractual obligations with the IOCs.

What to Expect from Ecuador's New President: Energy Public Policy

How We Got Here

On May 17, 2023, President Guillermo Lasso announced and enacted Executive Order Nº 741 by which, under his constitutional powers, he dissolved the Legislative Power. This is commonly known as "*muerte cruzada*" (mutual death). It is an institution instated in the 2008 Ecuadorean Constitution by which, under specific circumstances, either the Legislative Power or the President may dissolve the other power. President Lasso dissolved the Legislative Power on the grounds of severe political and internal crisis due to an impeachment process that, most likely, would have terminated his mandate.

As a consequence of the *muerte cruzada*, the President had to immediately call for elections and had special powers to enact laws prior to approval by the Constitutional Court. The elections were held on August 20 on first instance, and the ballotage on October 15, 2023, when Daniel Noboa was finally elected. The elected President will sit in office as of November 2023 and shall finish the term of President Lasso, meaning that his term will only last for 18 months, but he may run for reelection.

Under this political turmoil, President Noboa will have to sit in office for a very short term and enforce its government plan; most likely, with one eye open for a potential reelection. Daniel Noboa will be the youngest President to sit in office in Ecuador. He is 35-years-old and has vast studies in political science both

at Harvard and at George Washington University, as well as being known as a young entrepreneur with powerful connections as he runs his family business. Besides public campaign appearances and what is mentioned in his government plan, it is still an enigma how he plans to run the country in regard to the energy industry, which is of the utmost importance for the country's economy.

Oil and Gas

In regard to the oil and gas industry, President Noboa's Government Plan provides that he proposes to increase in the short term crude oil production by 20%. As of October 30, 2023, total daily crude oil production was 469,224 barrels; meaning that he has offered to increase production by approximately 90,000 barrels per day. Unfortunately, he has not explained how he will accomplish this goal; most importantly, if the increase in production will come from private companies—which currently only represents 18% of production—or will come from the national oil company (Petroecuador). This decision will determine whether Ecuador will be expecting investment from E&P operators and promoting bidding rounds for new oil and gas participants or whether Petroecuador will be hiring service companies for specific exploration and production services.

Also, most notably in the downstream activities, President Noboa's Government Plan analyzes the need for additional refining services in Ecuador in order to become self-sufficient with fuels and efficient in processing Ecuadorian crude oil. Ecuador is a crude oil exporter, but a fuel importer. Such gap between raw material prices and purchasing industrialized fuels is an important budget matter for the country's economy. For this proposal he does explain how Ecuador will be able to refine its own crude oil: (1) promoting private investments for potential new refineries; and (2) promoting public-private partnerships to update and modernize the existing refining facilities—Esmeraldas, La Libertad, and Shushufindi. Nevertheless, timing would be an issue but beginning these projects in his term could be a positive sign for the downstream industry in Ecuador.

Energy

The Government Plan emphasizes the need for an energy grid focused on renewable energy that is extremely intertwined with environmental protection policies. As such, for renewable energy, President Noboa issued two major proposals: (1) construct eight hydroelectric projects and (2) strengthen current regulations in order to promote public and private use of an environmentally clean technology. Once again, how he plans to construct eight hydroelectric projects is not answered, or which regulations he plans to enhance.

For energy matters time is of the essence to make important decisions on how to implement its agenda. Especially since from October 2023, due to lack of power produced by hydroelectric generators—as unusual droughts have caused several generators to stop functioning—Ecuador is suffering from daily power cuts. As a desperate measure, and as a result of President Lasso's direct request, Colombia will be selling electricity to Ecuador for an undisclosed price, which will most likely shorten the power outage periods. Nevertheless, President Noboa shall have to sit in office with an energy crisis and, therefore, we should expect immediate decisions on how to solve this problem for the short and the long term.

Mining

For mining activities, the Government Plan provides that it will promote mining production through private investment, especially for artisanal and small producers. One of the measures on how to achieve this goal is by opening the mining cadaster, which will allow new investments.

For mining activities, but applicable for energy and hydrocarbons, environmental licenses have been especially difficult to obtain. Regulations that have been enacted for this purpose have been fought by environmental groups and indigenous organizations and finally declared void by the Constitutional Court—such is the case of the Indigenous Consultation and the Prior Consultation for Environmental Licenses. Despite the offers for new investment in these industries, without proper solutions for environmental permits, such may be deemed infertile for international investments.

Public Appearances

A Government Plan is a legal requirement for any presidential candidate that may not be enforced but provides a glimpse into the administration. Nevertheless, in politics, more important than what is offered on paper is what is said and done.

Although President Noboa has shown a quiet and unreactive personality, without major specific messages on how he plans to run the country, a situation stands-out: his reactions to the Yasuni Public Consultation. On August 20, 2023, every Ecuadorian citizen was consulted, alongside the presidential ballot, about whether the Block Yasuni ITT operations shall stop as it is considered one of the most biodiverse regions in the world. The consult turns out in favor of stopping oil production in such oilfield with a majority of 59% of the voters. Such question was crucial during the campaign as the country split into environment defenders and pro-industries. All the electorate wanted to know where each candidate stood in this very simplistic and dualistic dilemma.

President Noboa openly acknowledges his support to stop petroleum production in the Yasuni ITT Block. He supports his decision on an economic analysis. He mentions that the price average for Ecuadorian crude oil shall not be more than US$70 per barrel and the production costs in such oilfield are approximately US$58 per barrel. Therefore, he argues that the profit for the country shall be only US$4 per barrel, which does not outweigh the potential environmental risks of exploration and production operations in such a sensitive area. He stated in an interview with local Magazine *Vistazo* in July 2023 that the probability of environmental damage in the Yasuni ITT oilfield is 15% to 20%. This data has been contrasted with a different perspective that suppose higher profits for the Ecuadorean State as well as not including the costs of dismantling an oilfield. Perhaps this was a campaign decision in order to reach young and environmentalist voters, and once faced with the reality of Ecuador's depleted budget, may revisit his decision; or, he truly errs on the side of the environment when dealing with decisions involving non-renewable projects.

What to Expect

In theory, we should except a government that rapidly addresses the issues the energy industry is facing by completing some "quick wins" by complying with its energy plan. This is mainly to promote investment in the energy, mining, and hydrocarbon industries as established therein despite its decision to support the public consultation of stop operations in the Yasuni ITT oilfield.

In practice, until a few weeks before the presidential transition, President Noboa has not publicly announced his plans and first actions in the energy industry, nor has he selected a Minister of Energy—a key component in every cabinet. The reality is yet to unfold, with several factors that do not allow a clear view of the future. The current electricity crisis amid the political sit-

uation and new election in just 18 months as of November 2023 has made the energy industry a nonessential component of the public debate despite its economic and social importance for the country.

MÉXICO

Rodrigo Sánchez Mejorada Raab, Reporter

New Judicial Criteria on Prior Consultation of Indigenous Communities

The Second Chamber of the Mexican Supreme Court recently published its March 3, 2023, decision (*Review of Amparo Suit 498/2021*), outlining the imperative of conducting prior consultations with indigenous peoples residing inside or near areas designated for industrial development.

The decision was issued as part of a constitutional challenge (Amparo) filed by a fishing community in Sinaloa State (Community) against an environmental impact statement issued by the Ministry of Environment and Natural Resources (Ministry). The Amparo challenged the authorization of a construction and operation project of an ammonia plant in the same bay where the Community members live. The Ministry argued that the project does not pose significant environmental danger or damage, making a prior consultation unnecessary.

The Court ruled in favor of the Community and established two judicial standards:

The first judicial standard dictates that a prior consultation must occur if there is a mere "possibility of affecting or impacting the rights of indigenous peoples and communities," without the need to prove specific damage or its significant impact. The potential for harm alone is sufficient grounds to initiate the consultation.

The second standard stipulates that prior consultation is mandatory for environmental assessments and authorizations related to projects, works, or activities that might impact the environment or the way of life of indigenous peoples and communities. Hence, before commencing any such endeavor, a prior consultation must be conducted in a manner that is free, informed, culturally appropriate, and conducted in good faith.

This development marks a significant stride toward ensuring indigenous communities' rights are respected, setting a new precedent for inclusive decision-making processes in Mexico's industrial and mining landscape.

Future of Mexico's Reformed Mining Law Still Uncertain

In Vol. 1, No. 1 (2023) of this *Newsletter*, we reported on the controversial changes to Mexico's Mining Law. These changes sparked a cascade of constitutional challenges (Amparos) from mining companies and an Unconstitutionality Action filed in the Supreme Court by opposition members of the House of Representatives. The Unconstitutionality Action was based on irregularities in the legislative process that approved the 18 pieces of legislation, including the bill with the changes to the Mining Law. Although several courts have resolved Amparos in favor of the mining companies, the Unconstitutionality Action has not yet been resolved as of the time of this report. While the Amparos provide individual protection against the changes for the mining companies that filed the Amparos, the Unconstitutionality Action, if successful, will effectively nullify the approved changes for everyone.

Earlier this year, changes to Mexican electoral laws were passed with similar irregularities in the legislative process. The opposition members of the House of Representatives also filed an Unconstitutionality Action against the relevant electoral law bills, leading the Supreme Court to invalidate the approved bills on May 8, 2023, with a 9 to 2 vote. Based on this recent precedent, it is expected that the Unconstitutionality Action against the changes to the Mining Law and related laws will also be successful.

PERÚ

Luis Felipe Huertas del Pino, Reporter

The Executive Announces Measures to Reduce Permitting Time Frames

In October 2023, as part of the measures to promote investments in the mining sector, the Ministry of Energy and Mines announced the incorporation of permits for water use, forestry, explosives management, and activities in protected natural areas related to mining concessionaires to the single window of the Ministry of Energy and Mines.

The Ministry of Energy and Mines created the single window in 2019 with the purpose of having a single channel through which the applicant of a permit (i.e., a mining company) can follow up on its procedures and obtain information in real time. With the creation of the single window, permits in mining, environmental, state property administration, public records, and protection of cultural property were incorporated.

In Peru, the term "permitology" refers to the excessive or difficult bureaucratic procedures required for an economic activity to be carried out, to such an extent that it discourages the activity or even scares off investments. Lately, when listing the problems that have a negative impact on the attractiveness of the mining sector as an investment destination, permitology is among those at the top of the list.

Peruvians are afraid of permitting. For example, unlike other jurisdictions where mineral rights are granted on the condition that the titleholder or concessionaire has made a discovery, in Peru the mining concession allows both exploration and exploitation activities, without the need to obtain any additional governmental consent.

Likewise, this fear is not recent. The distrust of public administration interventions in economic activities (an extension of permitology) has been so strong that, between 1992 and 2001, environmental and safety supervision in the mining sector was conducted by private firms that were hired directly by the mining companies.

Between 2000 and 2019 the Peruvian mining sector experienced unprecedented growth thanks to the liberalization of the economy, the privatization of state-owned mining companies, and the development of world-class projects. It is estimated that during this period the mining sector contributed one-third of the reduction in poverty at the national level. However, this growth was accompanied by a strengthening of the regulatory agencies, as a result of which the incumbent governments created new agencies, provided them with budgets, and issued a significant amount of regulation.

Peru was once successful in developing a thriving mining sector. To maintain the sector's attractiveness to investment, the current and future governments must succeed in managing the regulatory complexities and sophistications (permitology) that were generated as a consequence of the initial success. No doubt, the creation of single windows will contribute to this purpose, but the effort should not end there. The government must also invest resources in training public officials, improving the civil service, combating informality, and, of course, properly

training the judiciary, where the review of administrative permitting decisions takes place.

Oscar Benavides, Reporter

"Investment Is Welcomed . . . and Needed"

The Peruvian government has recently announced, through the Minister of Economics and Finance (MEF), that the country is in an economic recession. This announcement has been made given that the Peruvian economy has shown poor signs of recovery in the last months and the projections for Peru's economic growth in 2023 are in the range of only 0.9% and 1.1%.

In this economic context, the Peruvian government has decided to implement measures to reactivate the economy and the mining sector is one of the government's top priorities. Mining is one of the biggest contributors to the Peruvian economy. For example, between 2017 and 2021, mining's contribution was 16% of the country's GDP. In 2022, the contribution was estimated to be around 15% of the GDP.

However, despite its importance, mining investment is expected to decrease 16% during 2023 and is projected to decrease 7% in 2024, according to the Ministry of Energy and Mines (MEM). The Peruvian government has reacted to this tendency in the past few months and is seeking to implement new measures to encourage mining investment in the country.

Ventanilla Unica Digital

The MEM has shown openness to investors and has continuously been informing about a current review being conducted to the Peruvian mining legal framework aimed at providing the regulatory tools required to unlock existing mining projects and encourage new investments. The MEF, in turn, has announced that it plans to simplify and reduce red tape for mining through new legislative measures. (As of the date of this report, the MEF has not issued any of the announced legislative measures.)

One of the critical matters to be addressed by the MEM and the MEF is the reduction in the time required to obtain permits for conducting a mining project. As a reference, depending on prior consultation requirements, it can take between one and two years to initiate a mining exploration project. An important step in meeting this target has been the recent creation, by Supreme Decree No. 017-2023-EM dated October 1, 2023, of the *Ventanilla Única Digital* (VUD) of the MEM. The VUD will serve as a digital reception desk for centralizing permitting matters in the mining sector. As initially planned, the VUD will have the participation of nine State agencies involved in the issuance of permits in mining, environmental, water, archaeological, use of explosives, and surface lands matters, among others.

The main purpose of this system is to centralize information provided by mining companies in permitting matters and speed up the issuance of permits, but not to reduce the number of permits, which is what is ultimately required. A clear example of this can be found in the permitting required for initiating an exploration project, which must be rethought to reflect that exploration is an activity that has a low environmental and social impact, and that it is essential for securing the future of Peru's mining industry. The MEM expects to reduce the time required to obtain the permits needed to start a mining project in two thirds (i.e., six months in case of mining exploration projects).

Even though this is an important step in the reactivation of mining investment, clarity is still lacking on how long it will take to implement the VUD.

PERUMIN 36 Convention

Between September 25 and September 29, 2023, the 36th edition of the PERUMIN Mining Convention (PERUMIN) was held in the city of Arequipa. PERUMIN is one of the leading mining conventions in the world. It gathers a broad range of parties involved in the mining industry: public officers, representatives of foreign countries, large and small mining companies, operating mines and exploration companies, suppliers of equipment and machineries, college students, etc. At PERUMIN, local and international experiences are shared, and viewpoints confronted and discussed. It is the time of the year when Peruvian public officers convey their plans for mining.

At this year's PERUMIN, the Peruvian Government's officers in attendance tried to shed optimism on the future of the industry, welcomed mining investors to Peru and made announcements on bettering the legal framework, cutting red tape, and improving the context for mining. Announcements were made on changes to the formalization process of informal miners and on the tackling of illegal mining, which activities have demonstrated to be the source of significant environmental wrongdoings (among several other adverse impacts, within which we can count how the Peruvian public opinion approach toward mining, whether formal, legal, or not, has been influenced). "Informal miners" (small-scale and artisanal miners are called "informal miners" when subject to the mining formalization process) are expected to be given access to low-rate credits to ease the formalization of their activities, while committing to using clean technologies for the processing of minerals, leaving aside the use of elements such as mercury, which can be harmful to the health and the environment.

Announcements were also made at PERUMIN on a potential new scheme for a more even distribution of the royalties and taxes paid by mining companies, among the regional and local governments where they operate. It is expected that long discussions and complex negotiations will begin if the government decides to actively push these reforms, which are largely understood to be necessary, though politically sensitive at the same time.

Social Conflicts

There is no doubt that a multi-pronged strategy must be urgently developed (with creativity and by learning from past lessons) and implemented for adequately addressing social expectations and improving the way in which mining companies interact with their local stakeholders. It is no secret that social unrest (not infrequently fueled by political agendas, but often rooted in real unsatisfied demands of local communities) has been a significant factor in the stalling of mining investment. Our previous report referred to how Peru's recent relative social and political stability, after the turmoil in which the country lived at the beginning of 2023, had started regaining trust from investors. However, there is still a long way to go.

Of the 47 mining project portfolios presented by the MEM in January 2023 (involving an estimated US$53.7 million investment), 22 have social conflicts related to them. As an example, the Central Reserve Bank of Peru estimated that, in 2021, social conflicts reduced the growth of mining by 2.3%. That is, from a potential 12% growth, to a 9.7% one.

The MEM has said to be also focused on avoiding future conflicts and resolving existing ones related to mining activities in Peru, but concrete steps need to be taken on this urgent matter. We hope that our next report shares better news and some improvements in this area.

URUGUAY

Clara Villaamil, Reporter

Uruguay Moving Toward Its Second Stage of the Energy Transition

Background

Uruguay started its first stage of the energy transition in 2005 through a deep analysis of its energy matrix. In such year, discussions began on what changes should be implemented in the energy matrix in order to achieve a diversification of the existing energy sources of the country with the purpose of obtaining stability in the price of the generation and enough availability of the power capacity ("*potencia firme*") for all consumers.

In this context, the Executive approved in 2008 its long-term Energy Policy Plan 2005-2030 and in 2010 it was endorsed by all political parties. The main strategic guidelines of the Energy Policy Plan are the following:

- Institutional: To give the Executive competence in the implementation of the energy policy in the country.
- Energy supply: To diversify the energy mix, reduce dependency from fossil fuels, and increase the use of national resources.
- Energy demand: To promote the energy efficiency.
- Social: To grant access of the energy to all the consumers in an efficient and secure way.

Based on the Energy Policy Plan, the Executive approved several Decrees (being the most relevant: Decree 77/006, Decree 397/007, Decree 403/009, Decree 159/011, and Decree 424/011) by which the Executive requested of the government-owned national electric company ("*Administración Nacional de Usinas y Trasmisiones Eléctricas*" (UTE)) that it carry out competitive procedures in order to award power purchase agreements to successful bidders.

As a result of the first stage of energy transformation, 97% of the electricity generated in Uruguay came from renewable energy:

- 41 wind farms in operation with an installed capacity of 1,506 MW.
- 19 large-scale photovoltaic plants with a total capacity of 229 MW.

See Uruguay XXI, "Renewable Energies in Uruguay" (Oct. 2022). Although these numbers represent a great energy transformation, they do not reflect the entire energy matrix (they only reflect the electricity energy matrix). There is still 39% of the energy used in Uruguay that is generated from fossil fuels.

Therefore, Uruguay is currently preparing the second stage of transformation of its energy matrix with the purpose of achieving the total decarbonization of the matrix.

Second Stage of the Energy Transition

This second stage of transition is led by the Ministry of Industry, Energy and Mining, UTE, and ANCAP (another state-owned company that carries out activities in the production and distribution of fuels and alcohols, among other products). The second stage includes several challenges, including the development of the green hydrogen market not only for local consumption but also for export.

In this context, as per Resolution No. 294/022 dated December 20, 2022, Uruguay launched its green hydrogen roadmap to 2040. *See* https://www.gub.uy/ministerio-industria-energia-mineria/comunicacion/noticias/hoja-ruta-hidrogeno-verde-uruguay. The roadmap establishes the following phases:

- *Phase 1–From 2022 to 2024*. To develop the domestic market for the development of the hydrogen projects, by implementing new regulations and research applicable to the industry. As part of this phase, a Green Hydrogen Sector Fund was created for the purpose of fostering innovation and research in green hydrogen at the national level. It was made in order to finance the implementation of the first production project awarded on May 10, 2023, by the Government through a tender process to a consortium formed by local companies. The companies will receive US$10 million in subsidies to build a US$43.5 million green hydrogen production plant with the purpose to supply heavy vehicles. The project, called H24U, would initially be targeted at trucks used in the forestry industry, which will be adapted to run on hydrogen. The goal is for the project to be operational in 2025. In addition, in October 2021 ANCAP launched an initiative called H2U Offshore with the purpose of producing hydrogen from offshore wind energy. ANCAP plans to tender offshore maritime blocks for energy companies to carry out feasibility studies and potential installation of infrastructure for the production of green hydrogen and derivatives from offshore renewable energy, entirely at the company's own cost and risk. This tender has not been launched yet.
- *Phase 2—From 2025 to 2029*. In this phase it is expected that the first export-scale projects start their operations. This phase will include the development of adequate infrastructure (being the most relevant pipelines and transmission lines) and the implementation of incentives for the required investments.
- *Phase 3—From 2030 Onward*. In this phase it is expected that the domestic market is fully developed and consolidated. It is also expected that the production and export of green hydrogen and derivatives increases and keeps developing.

MOUs for International Cooperation

Alliances with countries that have import needs are critical for the future production of green hydrogen and derivatives. In this context, Uruguay has recently executed the following memorandums of understanding (MOUs):

- Joint Declaration of Intent between the Ministry of Industry, Energy and Mining of Uruguay and the Federal Ministry for Economic Affairs and Climate Action of Germany dated March 29, 2023. The purpose of the MOU is to intensify their cooperation in the supply and utilization of renewables energies.
- Memorandum of Understanding between the Ministry of Industry, Energy and Mining of Uruguay, the Ministry of Transfer and Public Works of Uruguay, the National Port Administration of Uruguay and Port of Rotterdam dated May 11, 2023. The purpose of the MOU is to cooperate in socially and economically viable projects linked to green hydrogen and derivatives.
- Memorandum of Understanding between the European Union and Uruguay dated July 18, 2023, on cooperation related to renewable energies, energy efficiency, and renewable hydrogen.

VENEZUELA

Santiago Fontiveros & Isabella Sordo, Reporters

Policy Developments in Venezuela's Framework for Methane Sales

In a significant development for the Venezuelan natural gas industry, the Venezuelan Ministry of Oil has recently issued two regulations that reshape the landscape for methane gas sales and transport in Venezuela. These regulations mark a significant milestone in the ongoing efforts to standardize and organize the gas industry.

In this report, we examine these new regulations and dissect their implications, especially considering the commercial landscape and how they will shape the future of the gas industry in Venezuela.

Legal Framework for Natural Gas in Venezuela

Under the Venezuelan legal framework, private companies can participate in all the activities across the natural gas value chain. While historically, Venezuela's energy sector has been predominantly state-controlled, the legal framework pertaining to natural gas presents an environment that is favorable for private companies in comparison to the oil legal framework. The regulatory landscape stipulates provisions and structures that encourage the active participation of private entities within the natural gas sector.

In accordance with article 22 of *Ley Orgánica de Hidrocarburos Gaseosos* (1999)–Natural Gas Master Law (NGML)—private companies can engage in exploration and production, transportation, storage, distribution, and marketing of natural gas, either independently or through partnerships with state-owned entities:

> The activities related to the exploration and exploitation of non-associated gaseous hydrocarbons, as well as those of processing, storage, transportation, distribution, industrialization, marketing, and export, may be carried out directly by the State or entities owned by it, or by private individuals, whether national or foreign, with or without the participation of the State.
>
> Activities to be carried out by private individuals, whether national or foreign, with or without the participation of the State, will require a license or permit, as appropriate, and must be linked to specific projects or purposes aimed at national development, in accordance with Article 3 of this Law.

Furthermore, specifically for transport, marketing, and distribution, article 27 of the NGML establishes that private companies can develop activities different from exploration and exploitation by obtaining a permit from the Ministry of Oil:

> Those who wish to carry out activities related to gaseous hydrocarbons, whether associated or non-associated, produced by others, must obtain the corresponding permit from the Ministry, following the definition of the project or specific purpose of these hydrocarbons . . . .

Overall, this framework seems to be designed to facilitate private investment, outlining clear guidelines and mechanisms for private companies to engage in exploration, production, distribution, and all the activities in the natural gas value chain. However, the Venezuelan natural gas industry has faced commercial challenges due to how it is structured, regardless of legal framework.

As a response to this issue, the Ministry of Oil has recently published two Resolutions: (1) Resolution No. 0019, dated August 15, 2023, establishing the tariffs for the transport service within the natural gas internal market (the "Transport Resolution"); and (2) Resolution No. 0020, dated August 15, 2023, establishing the price of the methane gas molecule for the internal market (the "Gas Price Resolution").

Both Resolutions set the prices that shall be charged for the methane gas molecule and its transport fee. In addition, the Resolutions also establish that no company can charge more or less than the established prices.

In addition, the Transport Resolution establishes a price range in accordance with the distance that the gas molecule will transit, and the Gas Price Resolution has delineated a broad spectrum of prices contingent upon the specific use of the gas as well as the classification of the client, distinguishing between the private (higher prices) and public (lower prices) sectors.

How Is the Natural Gas Industry Structured in Venezuela?

Considering all the producers, Venezuela is currently producing around 3,254 million cubic feet of gas per day but ranging around 4,900 million cubic feet of gas per day in the past five years (although only 1,754 million cubic feet of gas per day is currently entering the national gas system). Most of that production comes as an oil byproduct (associated gas) since PDVSA produces in a range of 2,525 to 4,200 million cubic feet of gas per day derived from oil production (it varies depending on how much oil is being produced). The rest of the gas production comes from PDVSA Gas (approximately 103 million cubic feet of gas per day) and the gas licenses with private participation (approximately 624 million cubic feet of gas per day) with a much higher production cost.

Source	% of total production (estimate)	% of gas entering the national system
PDVSA	77.6%–85.5%	58.6%
PDVSA Gas	2%–3.2%	5.8%
Gas Licenses	12.5%–19.2%	35.6%
Total	100%	100%

Although private companies can participate in all the activities, the gas system in Venezuela is centralized in state-owned companies. In addition to the gas production, the state-owned gas company, PDVSA Gas, has historically maintained a dominant position as the sole entity responsible for transporting and marketing natural gas in the country. Furthermore, PDVSA has often sold natural gas at prices that were significantly below market rates, which has posed challenges to the sustainability and attractiveness of the sector, hindering private investment participation in the Venezuelan natural gas industry, and has even led to consequences in PDVSA Gas's own operations.

About the Resolutions

The Resolutions represent a crucial effort to redress the commercial imbalance stemming from the structural setup of the gas industry in Venezuela. This initiative seeks to rectify a long-standing situation that has not been previously addressed by legal means.

From the perspective of the state-owned companies, these Resolutions offer multifaceted solutions. They mandate companies to charge for methane sales and gas transportation, setting these prices in U.S. Dollars to mitigate the risk of local currency devaluation. Consequently, this mechanism provides companies with a new and steady cash flow, enabling potential

investments in critical infrastructure. The Resolutions also provide a pricing mechanism that updates monthly, which differs greatly from the previous Resolution in price that charged a fixed price in Bolivars.

For private companies, the ability to charge for methane gas sales in the domestic market is significant progress. However, the Resolutions overlook the breakeven costs for private gas production, restricting the opportunities for these companies to sell their gas. The variation in pricing based on the gas's designated use—e.g., cheaper for the public sectors commercial use and costlier for the private sectors petrochemical applications (among others)—further complicates the scenario considering it limits the client scope for private companies if the established price does not meet their breakeven price.

Nonetheless, the Resolutions have the potential to stimulate investments in the gas pipelines and production due to the establishment of a U.S. Dollar-denominated price that companies can lawfully charge. This aspect might serve as a catalyst for attracting investments in the gas industry infrastructure, which was previously hindered by the absence of a clear and legal pricing framework.

Conclusions

The NGML has been widely praised for its pragmatism and friendly framework of investment. In a country that by low estimates holds the eighth biggest conventional natural gas reserves and by far the biggest in Latin America, that is not a small thing. Yet it has not propelled the industry to where it deserves to be. As discussed, the answer to this lies in the predominant market structure when the law was published. Most of the gas was produced by PDVSA as a byproduct of oil at a very cheap cost. The state enterprises consumed most of that gas as well, thus impeding the formation of a proper market-based pricing mechanism. Private producers were left selling to PDVSA Gas all its production and PDVSA Gas subsidizing the market. This led to a constant under-investment in the gas infrastructure by both the State and the private investors creating a host of problems both in upstream and midstream, e.g., damaged compressors, unattended wells, broken gas pipelines, chronic venting and flaring of associated gas, now at astonishing proportions, unreliable wells, and subpar pipe transmission. This reality has led again to pragmatism by adjusting the market price of gas. It falls short because it mostly considers PDVSA's cost of producing gas as the base for the market when in reality it has extremely different costs: onshore, offshore, high carbon, low carbon, high pressure, and low pressure, among others.

For private entities that need to justify to international investors a return on capital on a given timeframe—gas (not oil)—most amortize all the investment and operating costs in addition to producing an appropriate competitive return. Mostly this goes unattended in the Resolutions. However, it is a first step and if private licenses are permitted to sell directly to private clients at the higher rates and begin to see much needed cash flow, then the dynamic of the market and the international perception may well change for good.

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