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# LATIN AMERICA MINERAL AND ENERGY LAW Newsletter

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## *In this issue*



## ARGENTINA

*Inés Agüero Ovejero, Reporter*

**Latest Major Modifications to Mining Legal Framework in Argentina**

Amendment of the Argentine Mining Code: Canon Mining Fees

On December 1, 2022, through the enactment of the General Budget Law of the National Administration for financial year 2023 (the "Law"), General Budget Law, Nº 27,701, Argentine Congress https://www.boletinoficial.gob.ar/detalleAviso/primera/276927/20221201, Canon mining fees were modified and updated by amending articles 31, 213, 215, 219, and 221 of the Argentine Mining Code (AMC). These fees had not been modified since 2014.

- Canon Fee for Exploration Permits (*Cateos*): Article 122 of the Law modifies the fourth paragraph of article 31 of the AMC, establishing that the applicant for an exploration permit shall pay, provisionally, a fee of twenty-four Argentine pesos ($24) per square kilometer, which shall be paid in the manner, at the time, and with the effects determined in article 25 for exploration permit requests.
- Canon Fee updates: Article 123 of the Law modifies article 213 of the AMC by updating Canon Fees through a resolution issued by the National Secretariat of Mining, or the agency replacing it, according to the interannual variation of the Consumer Price Index (CPI) prepared and published by the National Institute of Statistics and Census (INDEC).

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## BOLIVIA

*Mattías Garrón, Reporter*

**The Legal and Regulatory Regime of Lithium in Bolivia and Its Current Development**

Lithium, known as the "oil of the future" is emerging as a strategic resource in the global transition to renewable energy. Bolivia, being one of the countries that comprise the so-called "lithium triangle," is home to the largest lithium reserves in the world, accounting for approximately one-quarter of global reserves.

Lithium is considered both a mineral resource and an energy resource. According to articles 369.II and 378.I of the Political Constitution of the State (2009), non-metallic resources in salt flats, brines, evaporites, sulfides, and others, as well as different forms of energy and their sources, are considered strategic for the country. Consequently, the State has control and direction over the exploration, exploitation, industrialization, transportation, and commercialization of lithium through public entities created for this purpose, as established in article 351.I of the Political Constitution of the State (2009).

Following these constitutional parameters, Law N° 535 on Mining and Metallurgy (2014) stipulates in article 26.IV, modified by Law Nº 928, that lithium, as well as potassium, are considered strategic elements whose development will be carried out by Yacimientos de Litio Boliviano (YLB). Furthermore, paragraphs II and III of article 26 of Law Nº 535 (2014) state that certain salt flats and saltwater lagoons such as Uyuni, Coipasa, and Pastos Grandes, among others, are deemed as reserved areas in favor of

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- Canon Fee scales: Article 124 of the Law modifies article 215 of the AMC by setting new Canon Fee scales.
    - For first category substances (gold, silver, platinum, mercury, copper, iron, lead, and lithium, among others) (article 3 AMC) and land river and alluvial sands productions (article 4, subsection a), provided they are exploited in fixed establishments, $1,900 per claim or unit of measurement.
    - For second category substances (article 4 AMC except for subsection b) $960 per claim
    - Provisional concessions for the exploration of substances of the first and second category, whatever the duration may be, shall pay $9,680 per unit of measurement or claim.
    - Mines whose ownership corresponds to the landowner, once transferred to a third party or registered by the owner, shall pay in the same manner and scale of the above-mentioned articles, according to their category.
- Expiration and rescue of the mine due to non-payment of the Canon Fee. Article 125 of the Law modifies the second paragraph of article 219 of the AMC. The concessionaire will have a non-extendable term of 45 days to rescue the mine, paying the updated fee owed plus a surcharge of 100%. The mine will automatically be vacated if the due amount is not paid on time.
- Underground Mines (*Socavones Generales*). Article 126 of the Law replaces article 221 of the AMC by updating Canon Fees in the case of articles 128, 124, 129, and 135 to an annual amount of $960 plus the corresponding fee for each new or abandoned mine concession acquired pursuant to the provisions of articles 133 and 134. In the case of article 135, such mining concessionaires shall also pay a fee of $4,800 for each 100 meters of surface declared as exploration area on each side of the workings.

Other Important Amendments to Consider

*Creation of the Federal Registry of Mining Suppliers*

On November 29, 2022, the National Mining Secretariat published Resolution N° 84/2022 (Nov. 28, 2022), https://www.argentina.gob.ar/normativa/nacional/resoluci%C3%B3n-84-2022-375669/texto, in the Official Gazette, through which the Federal Registry of Mining Suppliers (Registry) was created with the purpose of promoting and granting benefits to the suppliers of mining inputs and services registered in such Registry.

Through the Registry, individuals domiciled in Argentina and legal entities incorporated therein that, due to their activity or corporate purpose, offer goods, inputs, or services, including those of technological innovation and knowledge economy, will have an instrument to make visible the suppliers of goods, supplies, and services of the provinces of Argentina.

It also created a Federal Roundtable of Mining Suppliers, which shall be the place for permanent exchange and federal dialogue between different actors of the mining activity and will meet on a quarterly basis.

*Export Refund Cancellation—National Decree 57/2023*

On February 6, 2023, the National Government published Decree N° 57/2023 (Feb. 2, 2023), https://www.argentina.gob.ar/normativa/nacional/decreto-57-2023-379144/texto, removing for lithium, lithium oxide and hydroxide, lithium chloride, and lithium carbonate the export refund benefit for goods corresponding to materials manufactured within the provinces of Catamarca, Salta, and Jujuy (Puna Region). *See* Florencia Heredia & Agostina Martinez, "Mining Argentina," in *Lexology – Getting the Deal Through* 1–34 (2023).

Through these benefits an export tax refund of 1.5% was granted to lithium products and an extra 2.5% was granted to lithium products from the Puna Region (established by Resolution N° 762/93, amended by Resolution N° 479/98).

*Fiscal Registry of Mining Activities*

On March 10, 2023, the Tax Authority (*AFIP*), by means of General Resolution N° 5333/2023, https://www.argentina.gob.

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ar/normativa/nacional/resoluci%C3%B3n-5333-2023-380635/ texto, implemented the Fiscal Registry of Mining Activities (replacing the former Registry regulated by General Resolution N° 3692). By virtue of this Resolution, all mining companies, mining suppliers, and exploration permit holders must register in this Fiscal Registry. Likewise, it will be a *sine qua non-condition* to be registered in order to apply for any benefit under the Mining Investment Law N° 24,196.

**Declaration of Lithium as a *Strategic Mineral* and Suspension of Lithium Exploration Permits in the Province of La Rioja**

On January 30, 2023, the Governor of La Rioja, by means of Provincial Decree N° 63/2023 declared the suspension of the permits granted for lithium prospecting and exploration in the province, based on the provisions of Provincial Law N° 10,608 (published in the provincial Official Gazette on January 17, 2023), which declares Lithium as a "strategic resource of provincial public interest."

The Decree affects 23 areas with permits for prospecting and exploration. These areas will be transferred to the investigation and research of *Energía y Minerales Sociedad del Estado* (EMSE), the provincial state-owned company that the provincial government seeks to promote in order to develop lithium projects.

The Law and the Decree were strongly opposed by several national and provincial business chambers, and by the governors of the Provinces of Catamarca, Jujuy, and Salta—where the majority of the country's lithium projects are located—since as of today La Rioja has very few exploration projects. *See* Roberto Bellato, "Litio: Provincias Del Norte Rechazan Una Polémica Decisión Que Tomó El Gobernador de la Rioja" (Jan. 2023).

*Jimena Vega Olmos, Reporter*

**Expiration of Hydropower Concessions: Transfer of Hydropower Plants to the Federal State**

In the context of the privatization of the energy generation sector during the 1990s, different hydrogeneration units were transferred to the private sector through 30-year concessions. The relevant concession agreements establish that upon the expiration of the concession term, the assets must be reversed to the Federal State.

The 30-year term of the concessions awarded during the 1990s expires during 2023 and 2024. The first concessions expired and were reversed on August 11, 2023. These centrals account for approximately 4,000 megawatts (MW) of capacity and have a significant role in the supply of electricity in the country.

In advance to the expiration of the concession terms, through Resolution SE 130/2022, published in the Official Gazette on March 10, 2023, https://www.boletinoficial.gob.ar/, the Secretariat of Energy formed a working group in charge of collecting information on the technical, economic, legal, and environmental aspects of the federal concessions.

During 2023, it announced its decision for the hydropower plants to be operated by Energía Argentina S.A. (ENARSA), a state-owned energy corporation created in 2004. In this line, on June 5, 2023, the Secretariat of Energy instructed ENARSA to temporarily take control over the following hydropower units upon the expiration of their concessions and reversion of the assets to the Federal State on August 11, 2023—Alicurá (1,000 MW, operated by AES), El Chocón-Arroyito (1,200 MW and 120 MW, operated by Enel), Planicie Banderita (450 MW, operated by Orazul), and Piedra del Águila (1,400 MW, operated by Central Puerto)—and adopt all necessary measures to ensure the continuity of the operation of the units and the supply of energy. *See* Note NO-2023-64071764-APN-SE#MEC (June 5, 2023), available at https://econojournal.com.ar/2023/06/royon-instruyo-a-una-empresa-estatal-a-tomar-posesion-de-las-represas/. During 2024, the following concessions shall expire: Los Nihuiles I, II, and III; Agua del Toro; Los Reyunos; El Tigre; Río Hondo; and Los Quiroga. In 2025: Futaleufú, Cabra Corral, and El Tunal. In 2026: Ullum, El Cadillal, Escaba, and Pueblo Viejo. In 2029: Picún Leufú.

Such decision faced several challenges. For example, the Argentine Energy Institute "General Mosconi" has publicly criticized such decision in the understanding that ENARSA lacks the necessary capabilities to adequately operate all plants and that the federal government should apply the contractual provisions that authorize it to extend the concessions for one year, in order for the following administration (Argentina has presidential elections in 2023) to prepare the technical and tariff studies to allow for the carrying out of the necessary investments and the normal operation and maintenance of these key assets.

Several provincial governments (of the provinces in which the plants are located), including Neuquén and Río Negro, have also criticized the federal government's decision. They demand provincial participation in the management of the different plants and have made claims regarding the adjustment of royalties and the application of a canon for the use of provincial waters (as of this date, hydropower plants were exempt from such payment).

However, despite the challenges the federal government has insisted in its decision to assign the operation of the generation units to ENARSA.

**Approval of the Federal High Voltage Power Transmission System Expansion Plan**

Through Resolution SE N° 507/2023, published in the Official Gazette on June 12, 2023, the Secretariat of Energy approved Argentina's federal high voltage power transmission system expansion plan, including projects through the entire territory. The Secretariat of Energy also requested the Electricity Federal Council, the Management Committee of the Federal Power Transmission Federal Council, Compañía Administradora del Mercado Mayorista Eléctrico S.A. (the grid administrator), the Special Unit of the Power Transmission System, and the Management Committee of the Power Supply Transportation Works Trust to cooperate with the Secretary of Energy in order to complete the infrastructure projects included in the expansion plan.

This plan lists the transmission expansion works that shall be prioritized by the Argentine government in connection with the expansion of the existing high voltage transmission net-

work. The expansion of the grid is crucial to remove one of the main obstacles currently deterring the development of renewable energy generation projects in Argentina: transmission restraints.

The identification of the works is a good step toward the expansion of the grid. However, there are certain uncertainties about timing and the manner in which the expansion works shall be financed since, based on publicly available information, the Argentine government has only partially secured funding for these projects and, at least for the time being, there are no plans to develop these projects through public and private partnerships or mixed schemes.

**Amendments to the Private PPA Market Regulations**

Argentina's renewable energy contract market is mainly structured on the basis of two pillars: (1) contracts awarded in the context of pre-2015 public programs and certain public tenders called by the federal government in 2016 and 2017; and (2) a private term market known as *Mercado a Término de Energías Renovables* (MATER).

The regulations governing MATER (Resolution MEyM N° 281/2017, published in the Official Gazette on August 22, 2017, as amended and supplemented from time to time) established the possibility to apply for and obtain dispatch priority in case of congestions of the grid and the requirements and conditions to that effect. In May 2023, the Secretariat of Energy issued Resolution SE 360/2023, published in the Official Gazette on May 10, 2023, amending certain provisions of the MATER regulation.

Among other changes, considering the critical situation of the power transmission grid and the need to expand transmission capacity, the new regulation recognizes the possibility to apply for dispatch priority in the case of transmission expansion works to be built or fully paid by one or more MATER projects. The new rules allow to reserve dispatch priority over the additional transmission capacity resulting from the expansion by the generation project or projects that carry out and finance the relevant costs. The transmission expansion project must be agreed with CAMMESA, the grid administrator, and the dispatch priority reserve shall be subject to the quarterly payment of the equivalent of US$500 per MW of priority and to a maximum term of 2,190 days (including the construction stage).

Another important amendment to the existing regulations relates to the maintenance of the assigned dispatch priority. The regulations stated that failure to achieve commercial operation date (COD) within the committed terms would trigger the revocation of the assigned dispatch priority and would prevent the relevant company from applying to the allocation of dispatch priority for a significant term.

The new rules limit the last restriction to four consecutive quarters, and also allow the project to obtain, in addition to other extensions under the existing regulations, a new extension of time of up to 720 days to achieve COD, subject to the compliance of certain requirements and the payment to the grid administrator, every 30 days, of an amount of US$1,500 per MW of assigned dispatch priority multiplied by a specific factor.

These regulatory amendments were favorably received by the market and provide additional tools to continue developing the renewable energy generation market in Argentina. (The government adopted other measures to promote the development of new renewable energy projects and the mitigation of the transmission constraints such as the national and international public tender Ren MDI to award power purchase agreements to be entered into with CAMMESA with the aim of substituting forced generation and diverse the energy matrix, with a cap of 620 MW of aggregate capacity. *See* Resolution SE 36/2023, published in the Official Gazette on February 2, 2023.)

**Argentine Government Energy Secretariat Implements the Zero-Rate Export Benefit Under the Promotional Regime for Hydrocarbon Investments**

Following the expropriation of YPF S.A.'s (the largest hydrocarbon company in Argentina) controlling participation in 2012, in 2013 the Argentine government issued Decree N° 929/2013 pursuant to which it created the Promotional Regime for the Investment in Hydrocarbons Exploitation.

Subject to the compliance with certain requirements, minimum investments, and terms, under this regime beneficiaries are granted the right to export 20% of the relevant project's production exempt from export taxes and the right to maintain abroad a freely dispose of 100% of the foreign currency proceeds of such exports. In the event the beneficiary is unable to export hydrocarbons as a result of governmental restrictions imposed to protect domestic demand, the promotional regime grants an alternate right to obtain—in relation to the aforementioned percentage of the production—a price not lower than the export parity price and, also, the right to access the foreign exchange market to acquire and transfer abroad freely available funds for an equal amount.

Given the critical situation of Argentina's balance of payments and the extremely harsh exchange controls imposed by the federal government, these benefits are very important, particularly those related to the free disposition of export proceeds and the alternative right to access the foreign exchange market. Currently, as a result of the foreign exchange controls in effect in Argentina, companies are facing many difficulties to make import payments, pay services abroad, pay dividends, etc. Restrictions have also affected repayment of cross-border financings. In view of this, the ability to maintain a portion of their export proceeds abroad and use them freely is, clearly, important. (The right to maintain abroad a portion of the hydrocarbon export proceeds is a specific exemption to the general obligation, applying to all exporters, to repatriate to Argentina and convert to pesos in the official foreign exchange market within specific terms counted as from customs clearance of the relevant export. *See* Decree N° 609/2019, and section 2.1 of the restated text of the foreign exchange regulations issued by the Argentine Central Bank, https://bcra.gob.ar/Pdfs/Texord/t-excbio.pdf.)

There were certain projects approved under this regime in 2013 and 2015: the Loma Campana project (YPF S.A. – Compañía de Hidrocarburo No Convencional S.R.L.) and the La Amarga Chica project (YPF S.A. – Petronas E&P Argentina S.A.), both located in the Province of Neuquén. More recently, through Resolution SE 509/2023 (published in the Official Gazette on June 13, 2023), the Secretariat of Energy approved the qualification of an additional project under the regime: Chevron Argentina S.R.L.'s El Trapial Este unconventional project.

However, the formal recognition by the Argentine government of the condition of beneficiary of the companies owning these projects only took place during the last quarter of 2022, *see* Resolution SE 655/2022, published in the Official Gazette on September 25, 2022 (Loma Campana), and Resolution SE 779/2022, published in the Official Gazette on November 28, 2022 (La Amarga Chica), and the issuance of the necessary implementing regulations was further delayed. Therefore, although in theory these projects were entitled to apply the bene-

fits as from 2018 and 2020, the effective enjoyment of the benefits was delayed.

In January 2023, the Secretariat of Energy issued Resolution SE 26/2023 approving the implementing regulations of the right to export 20% of the production with no export duties. Shortly after, the Customs Administration amended its systems to allow export clearance with 0% duties. One of the positive aspects of Resolution SE 26/2023 is beneficiaries may compensate for the delays in the recognition of the benefit. In this regard, the regulation states that beneficiaries will be allowed to export with 0% duty 20% of the production that may have accumulated during the preceding years and could not be exported with the export duty exemption benefit as a result of the lack of regulation.

Unfortunately, as of July 1, 2023, the Argentine Central Bank has not yet issued the implementing regulations required for beneficiaries to be able to enjoy and effectively apply the foreign exchange benefits recognized under the promotional regime. Unless the Central Bank regulates the conditions to apply the benefits at the foreign exchange level, beneficiaries will continue to be obliged to repatriate and settle for pesos 100% of their export proceeds in the official foreign exchange market.

## BOLIVIA

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the Bolivian State, allowing only YLB to engage in mining activities in these areas. Additionally, the National Electricity Company (ENDE) is authorized to undertake projects for electricity generation based on geothermal resources, such as geothermal lithium, located in these areas.

YLB was created through Law Nº 928 (2017) as a state strategic company, under the supervision of the Ministry of Energy. According to paragraphs I, II, and III of the Sole Article of Law Nº 928 (2017), YLB is responsible for overseeing all activities that encompass the productive chain of evaporitic resources. It is also tasked with developing the basic chemical processes for the production and commercialization of lithium chloride, lithium sulfate, lithium hydroxide, and lithium carbonate; potassium chloride, potassium nitrate, potassium sulfate, derived and intermediate salts, and other products of the evaporitic chain, with 100% state ownership.

Nevertheless, under paragraph III of the Sole Article of Law Nº 928 (2017), subsequent processes of semi-industrialization, industrialization, and waste processing can be carried out through association contracts (CAs) with national or foreign private companies, while maintaining the majority participation of the State. To this end, it will be necessary to enter into CAs with private mining entities, whether national or foreign, strictly limited to activities of semi-industrialization, industrialization, and/or waste processing due to the legal restrictions applied to lithium. According to the provisions of articles 145 to 150 of Law Nº 535 (2014), CAs are signed through a bidding or public invitation process when initiated by YLB and must contain the minimum mandatory clauses required by applicable regulations. Furthermore, YLB's agreed-upon participation within the CA must not be less than 55% of profits and revenues. The application and signing process of a CA must adhere to the parameters set forth in Law Nº 535 and the specific corresponding regulations that currently exist or may be created for this purpose.

To date, YLB is in a pilot phase, which involves experimentation and adjustment, in the Uyuni, Coipasa, and Pastos Grandes salt flats. In this phase, YLB is responsible for extracting lithium carbonate from the brines found in the Uyuni salt flat. Because of the positive results that were obtained in the pilot-scale lithium carbonate extraction, YLB is progressing toward the establishment of a lithium carbonate industrialization plant in Llipi, Uyuni, which is expected to start operating in the third quarter of 2023. In Coipasa and Pastos Grandes, exploration activities are ongoing, and if satisfactory results are achieved, new industrial plants are planned to be installed in both locations. PPO Legal & Tax, "Mining Report," at 6–7 (2023), https://www.ppolegal.com/wp-content/uploads/2023/04/Reporte-Minero-Ed-No-4.pdf.

In addition, pilot plants to produce lithium-ion batteries and cathode materials were established in Bolivia. These plants are operating and represent the pilot phase of the lithium industrialization process in the country. The lithium-ion battery pilot plant, located in the La Palca industrial complex in Potosí, was installed in 2014 and serves as a training, experimentation, and lithium battery production center. Likewise, in 2017, a cathode materials pilot plant was inaugurated in the same industrial complex. This plant is involved in the synthesis and production of lithium manganese oxide and lithium nickel-manganese-cobalt oxide, which are essential components for rechargeable lithium-ion batteries. YLB, "Brief Historical Review" (June 27, 2023), https://www.ylb.gob.bo/inicio/acerca_de_YLB.

In April 2021, the Bolivian government launched an international call for Direct Lithium Extraction (DLE). Twenty proposals were received, out of which eight were preselected. Subsequently, confidentiality agreements were signed between these companies and the Bolivian government to protect the involved technology. Out of the eight preselected companies, two were excluded from the process, leaving six foreign companies competing to sign an agreement with Bolivia for lithium industrialization. The six preselected companies conducted tests with the brine from the Uyuni, Coipasa, and Pastos Grandes salt flats, achieving lithium recovery results of over 80%, with some even exceeding 90%. YLB, Final Results Report, "International Call for Direct Extraction of Lithium (DEL)" (June 15, 2022), https://www.ylb.gob.bo/resources/img/InformeFinalDeResultados.pdf.

YLB selected and signed an agreement with the Chinese company CBC to implement DLE technology in lithium industrialization. In this regard, President Luis Arce announced that CBC will invest $1 billion in an initial development phase. It is projected that by the first quarter of 2025, YLB and CBC will commercialize the production of lithium carbonate, as well as other industrialized products such as cathodes and lithium batteries. It was also mentioned that agreements will be signed with other companies that use EDL technology and have demonstrated recovery rates above 80% and 90%. Yuri Flores, "The Government Signs with the Chinese CBC the Industrialization of Lithium with DEL Technology," *La Razón* (Jan. 20, 2023).

In consequence, there is great potential for the growth of the lithium industry in Bolivia due to its vast reserves, which are the most significant globally. With the aim of securing control over these valuable reserves, Bolivia has adopted a strategy that provides unique opportunities for sustainable development and national progress in this industry.

In a press conference YLB President, Carlos Ramos, announced that Bolivia has 19 salt flats that will enhance its lithium reserves. Currently, the country has 21 million tons of reserves. Yuri Flores, "Bolivia Has 19 Salt Flats That Will Boost Lithium Reserves," *La Razón* (Dec. 29, 2022). The Mineral Commodity Summaries 2023 Report published by the U.S. Geological Survey (USGS) confirmed that Bolivia's lithium resources

remained at 21 million metric tons in 2022, as reported in the 2019 study conducted by SRK Consulting. Javier Aliaga, "The Bolivian Paradox: Abundance of Lithium, but Marginal in the Market," *Página SIETE* (May 2, 2023). However, drilling, and prospecting studies are being carried out in the Coipasa and Pastos Grandes salt flats to determine the lithium reserves in both areas, which will increase the number of reserves.

**Bolivia's Mining Transformation Toward a Technological Minerals Economy: An Analysis of the Supreme Decree on Technological Minerals and Rare Earths**

Bolivia's commitment to technological mining promises to strengthen the domestic industry and create employment opportunities. However, it also poses challenges regarding the responsible and sustainable exploitation of these resources. This transition has the potential to redefine Bolivia's position in the global market for technological minerals and rare earths.

In the pursuit of economic diversification and with the aim of increasing mining-generated income, Bolivia is making progress in its transition from traditional mining to technological mining. This shift is focused on the exploration, prospecting, exploitation, and commercialization of technological minerals and rare earths. The Ministry of Mining and Metallurgy of Bolivia institutionalized this transition through Supreme Decree Nº 4721 (2022), which led to the creation of the Vice Ministry of Technological Minerals and Mining Productive Development.

Technological minerals and rare earths, including elements such as uranium, titanium, niobium, tantalum, thorium, yttrium, nickel, cobalt, chromium, and manganese, among others, are in high demand in the technology industry and represent an opportunity for Bolivia to diversify its economy. These minerals are essential for the development of emerging and advanced technologies, and global production is dominated by a few countries, with China being the most prominent. Anton R. Chakhmouradian & Frances Wall, "Rare Earth Elements: Minerals, Mines, Magnets (and More)," 8(5) *Elements* 333 (2012).

Supreme Decree Nº 4721 (2022) led to the formation of the Technological Minerals Management, an entity under the Bolivian Mining Corporation (Comibol), responsible for promoting industrialization and import substitution in the sector. Since its enactment, geological maps have been developed to locate deposits of technological minerals and rare earths, and samples from promising deposits have been sent for analysis, revealing significant results. This change in mining policy has profound legal and economic implications. Legally, it translates into a restructuring of the ministry responsible for mining and metallurgy. Economically, it aims at diversification toward higher-value minerals with increasing demand, which can have a significant impact on the Bolivian economy.

Bolivia has identified several deposits of technological minerals throughout the country, in regions such as Potosí, Cochabamba, and Santa Cruz. At Cerro Manomó, in Santa Rosa, significant deposits of uranium, thorium, and rhodium have been discovered, with the latter being priced ten times higher than gold. In San Luis, Potosí, there are deposits of nickel, cobalt, and chromium, in addition to the Mutún project with iron and manganese, all of which are key inputs for batteries and lithium cathodes. Alicia Tejada Soruco, *Minería En Las Tierras Bajas De Bolivia* (2012).

Bolivia's commitment to technological mining could strengthen the domestic industry, promote import substitution, and create employment opportunities. However, the country must effectively and responsibly address the inherent challenges of exploiting these resources to ensure sustainable and equitable growth in the sector. Ultimately, Bolivia's transition to technological mining could redefine its role in the global stage of technological minerals and rare earths.

**Mercury in Bolivia: A Race to Stop the Contamination of Indigenous Villages and Ecosystems**

Bolivia is globally recognized for its landscapes, culture, and biodiversity. This is not surprising since this country hosts around 40% of the world's biological diversity. It is precisely because of the diversity it contains that preserving it becomes very difficult, as this characteristic makes it more vulnerable. Through multiple investigations conducted by various international and national institutions, it has been evidenced that one of the issues that poses the greatest threat to the natural environment is Mercury, a heavy metal that can be extremely toxic in certain concentrations, both for human health and the well-being of nature. The impact has been such that several communities have been affected by this substance, with contaminated rivers resulting in the poisoning of fish in the area. Marcello M. Veiga, Peter A. Maxson & Lars D. Hylander, "Origin and Consumption of Mercury in Small-Scale Gold Mining," 14(3) *J. of Cleaner Production* 436 (2006).

The reason why this condition becomes so important is due to the lack of legislation and control that existed in Bolivia regarding the mercury market. On top of the ongoing battle against deforestation and the increasing illegal mining that became another form of commerce, the Indigenous people that habit one of the most affected areas in the Amazonia region had to settle for not having the mechanisms to combat this phenomenon that threatens their fish, water, and main sources of income, and that raised alarming health contamination results according to a new report that was made public in the local newsletter. *See* Jose Luis Saavedra, "Gold Mining and the Crime of Ecocide," *Página SIETE* (June 25, 2023).

The problem of mercury in Bolivia lies in its undetectable nature, which makes its control and effective prevention difficult. Mercury, a highly toxic heavy metal, is used in artisanal and illegal mining in the country, especially in gold extraction. This practice leads to the indiscriminate release of mercury into the environment, contaminating water bodies and aquatic ecosystems.

Despite the existence of national and international regulations, gaps and needs have been identified regarding the creation of new legal, technical, and administrative instruments for the control and monitoring of mercury in its different forms. The latest regulation on this matter dates back to June of this year, through Supreme Decree Nº 4959 (2023), which establishes the Unique Mercury Registry (RUME) with the purpose of registering all natural or legal persons, public or private, intending to engage in import, export, or commercialization activities of mercury. This registry is under the responsibility of the Ministry of Environment and Water. The requirements for registration in the RUME will be regulated by the Ministry of Environment and Water. Therefore, the government took the first steps in order to strengthen the institutional capacity of government entities responsible for addressing this issue and established a common database and information system to enhance control and monitoring throughout the cycle.

*Gonzalo Dávila, Reporter*

**Bolivia Gets on the Green Bonds Train**

New Bolivian Regulations on Green Bonds

In line with the principles and guidelines for the issuance of Green Bonds, Social Bonds and Sustainable Bonds issued by the International Capital Markets Association (ICMA), recommended and intended to promote integrity, transparency, and disclosure of information in the development of the bonds market, the Bolivian financial regulator "*Autoridad de Supervisión del Sistema Financiero*" (ASFI), by means of the communication note ASFI N°749/2022 of December 30, 2022, announced the publication, in the Electronic Gazette of Financial Regulation, of the Administrative Resolution ASFI N°1392/2022, through which the regulatory financial entity approved modifications to the "Regulations of the Securities Market Registry" as well as related regulations, with the objective of adapting the stock market legislation in force in Bolivia to the current context of environmental protection. In particular, through the modifications, ASFI intends to regulate the registration, authorization, negotiation, and issuance of Green, Social and Sustainable Bonds in the Bolivian Stock Market.

As result of the foregoing, the following related regulations have undergone modifications: "the Issuance Prospects Manual," "the Regulations for Carrying Out External Audit Work," and "the Regulations for Carrying Out External Assessment Work."

Definitions to Take into Account

According to subparagraphs (b), (c), (d), (m), (n), and (o) of article 3 of ASFI Resolution N°1392/2022, the definitions of "Social Bonds," "Sustainable Bonds," and "Green Bonds" are closely linked to the ones of "Social Projects," "Sustainable Projects," and "Green Projects" as shown below:

- *Social Bonds*, conceived as fixed-income securities that represent a long-term debt obligation contracted by an issuing entity, whose resources will be exclusively used to finance or refinance new or existing projects that are eligible as Social Projects;
- *Sustainable Bonds,* conceived as fixed-income securities that represent a long-term debt obligation contracted by an issuing entity, where the resources will be exclusively used to finance or refinance a combination of Green Projects and Social Projects;
- *Green Bonds*, conceived fixed-income securities that represent a long-term debt obligation contracted by an issuing entity, whose resources will be exclusively used to finance or refinance new or existing projects that are eligible as Green Projects;
- *Social Projects*, understood as projects whose objective is to address or mitigate a specific social problem and/or try to achieve positive social results especially, but not exclusively, for a target population;
- *Sustainable Projects,* understood as projects that seek to generate a positive impact on the well-being of a certain social group;
- *Green Projects,* understood as projects that seek specific environmental benefits subject to evaluation and quantification.

Parameters for Choosing Projects and for the Use of Funds

However, the modifications contemplate, in Annex 4 of Book I, Title I, Chapter III of the Compilation of Standards for the Stock Market, the "Principles for the Issuance of Green Bonds, Sustainable Bonds and Social Bonds," which refer to guidelines:

(a) For the "use of funds," highlighting the obligation to indicate the destination of the funds, (obligation to be used in projects that generate clear and specific environmental and/or social benefits), and must be described in detail and quantified by the transmitter.

(b) For the "selection and evaluation of projects," noting that the issuance of Green, Social, and/or Sustainable Bonds must be exclusively used to finance the following types of projects:

*Green Projects*:

- Renewable energy;
- Energy efficiency;
- Pollution prevention and control;
- Sustainable management of natural resources and land use;
- Conservation of Biodiversity;
- Clean transport;
- Sustainable management of water and wastewater;
- Adaptation to climate change;
- Products adapted to the ecological and circular economy;
- Technologies and production processes.

*Social Projects*:

- Basic services infrastructure;
- Access to basic services;
- Affordable housing;
- Employment generation;
- Food safety;
- Socioeconomic advances and empowerment.

Other Important Conditions

The said regulation (subparagraph (a) of the "Principles for the Issuance of Green Bonds, Sustainable Bonds and Social Bonds") provides that all funds from the issuance of Green, Social, and/or Sustainable Bonds must be used exclusively to finance or refinance new or existing green or social projects, the financing being partial or total with respect to the requirement of resources for each project.

The funds must be deposited in an exclusive account for their application (subparagraph (c) of the "Principles for the Issuance of Green Bonds, Sustainable Bonds and Social Bonds").

Issuing companies must have updated information on the use of the funds obtained from the issuance, providing the list of benefited projects and their description, number of resources assigned, expected impacts, and quantitative and qualitative performance indicators. Revisions by ASFI are mandatory in annual basis (subparagraph (d) of the "Principles for the Issuance of Green Bonds, Sustainable Bonds and Social Bonds").

Alignment with the Sustainable Development Goals (SDGs)

With these regulations, the country takes a new step in regulatory matters in relation to thematic bonds, aligning itself with

both the SDGs of the United Nations 2030 Agenda and the Paris Agreement on Climate Change of which Bolivia is a signatory. In addition, it advances in the development of sustainable finances where capital markets have an irreplaceable and fundamental role, motivating the financing of projects related to environmental, social, and sustainability issues.

First Issuance of Funds Earmarked for Green Bonds

As a result, the Bolivian Stock Exchange has already begun to disseminate information on green bonds through a booklet called "Guide to Social, Green and Sustainable Bonds." But last April, through an official statement published on its website, the Bolivian bank "Banco de Desarrollo Productivo Sociedad Anónima Mixta" (BDP) announced the authorization by its shareholders of a "Sustainable Bond Program," which contemplates the first issuance of US$50 million in the national stock market, with the objective of financing environmentally responsible investments. Therefore, once authorized and registered in the ASFI Stock Market Registry, the BDP becomes the first entity to offer this instrument for exclusively financing green or social projects or a combination of both in the Bolivian stock market.

Now it remains to wait for the appearance of green projects and the application of the approved standard.

## CHILE

*Alejandro Montt, Reporter*

**Chilean National Lithium Strategy**

On April 20, 2023, the "National Lithium Strategy" (NLS) was announced. Later, on June 14, 2023, the Ministry of Mining released the NLS with more detail and establishing dates and milestones.

Chile has the largest lithium reserves in the world ready for exploitation (36% of such reserves) and is the second largest lithium producer in the world, with almost one-third of the global production.

Lithium in Chile is reserved to the State as of the year 1979. The Chilean Constitution establishes that it is possible to exploit lithium (1) directly by the State or its companies, (2) through administrative concessions, or (3) through special operating contracts. Therefore, in general, the only way for private entities to exploit lithium is to hold mining concessions duly constituted before January 1, 1979, or to obtain from the State an administrative concession or a special operating contract for lithium extraction (CEOL).

Currently, the only existing companies that exploits lithium in Chile are Sociedad Química y Minera de Chile S.A. (SQM) and Albemarle Corporation (Albemarle). The State entered into exploitation agreements with both companies, establishing the terms of conditions of such exploitation and the relevant payments to the State (royalty, R&D, communities, and others). SQM's production represents 65% of Chile's total production, and its contract with CORFO (the Chilean State entity that controls the mining property in the Salar de Atacama) ends in 2030. Albermarle represents the remaining 35% of the total lithium production, and its contract with CORFO terminates in 2043.

The NLS was issued to open the door for new private investment in the lithium industry in Chile, to explain the participation of the State in future projects, and to outline the main elements of the regulatory framework for the development of the industry in the country.

The key points of the NLS are:

1. Participation of the Chilean State in the entire production cycle, and creation of a National Lithium Company.

In this respect, a bill will be sent to Congress during the end of this year, after a process of consultation with different stakeholders (communities, local authorities, Indigenous people, academia, and others) is held.

This National Lithium Company will be a 100% state-owned company and is intended to participate in the entire lithium industrial cycle, from resource surveys to the assembly of battery cells and recycling. This entity will also seek private partners for the development of new projects. The business model of this public-private partnership will be defined in the aforementioned bill.

The bill for the creation of a public company will have to face a divided Congress and overcome a qualified quorum. In principle, this quorum would be the absolute majority of the House of Representatives members and Senators in office, but the bill will have to be further reviewed in order to know if the Organic Constitutional Law on Mining Concessions (Law Nº 18,097) and the current Constitution will also be modified, in which case the quorums would be higher. In addition to the above, in the next few months the draft of a new Constitution will be discussed, so it will be necessary to abide by the provisions of this proposal, in case it is approved.

2. Incorporation of the State in the production of the Atacama salt flat (*Salar de Atacama*).

CODELCO will be the State's representative to negotiate with the companies that currently produce in the Salar de Atacama (SQM and Albemarle).

Negotiations have already begun with SQM to agree on how the State will take over its operation after 2030. No date has been set yet with Albemarle (its contract with the State terminates on 2043).

CODELCO has already created three subsidiaries for the lithium business: Salares de Chile SpA (lithium business consolidation vehicle), Minera Tarar SpA (Salar de Atacama operations), and Salar de Maricunga SpA (Salar de Maricunga operation).

The State will fully respect the provisions of the current contracts with SQM and Albemarle; therefore, any modification to these contracts and the State's early entry into the Salar de Atacama operation will be the result of an agreement between the parties involved.

3. Participation of private entities in the exploration, prospecting, and exploitation of other salt flats.

Until the National Lithium Company is created, CEOLs will be granted to subsidiaries of CODELCO and ENAMI for the development of new projects in places where they already have a presence, and they will be able to seek private investors to partner in such development.

Projects with strategic value will establish public-private partnerships with control of production decisions by the State.

A survey of the available resources in salt flats with potential will be carried out, generating conditions for the potential extraction of lithium. The National Service of Geology and Mining (SERNAGEOMIN) identifies at least 45 salt flats (18 of interest in the Antofagasta and Atacama regions) and 18 salt ponds in Chile.

In addition, international tenders will be called in the first half of 2024 for the exploration salt flats with exploitation potential. If the results are positive, the successful bidders of ex-

ploration contracts will have the preferential right to exploit said salt flat in association with a state-owned company.

For all new projects, the conditions and benefits established in the contracts that CORFO has in the Salar de Atacama with SQM and Albemarle shall be considered as a basis.

4. Creation of a network of protected salt flats.

The aim is to protect at least 30% of the surface area of these ecosystems, in line with Chile's international obligations under the Framework Convention on Biological Diversity.

Criteria and procedures for defining areas and protection status will be defined during 2023.

5. New technologies and standards.

The ELN aims to implement technologies that minimize the environmental impact of lithium recovery.

Therefore, it is one of the goals of the policies to establish an entry standard based on direct brine extraction (DEL/R), accompanied by sustainable reinjection methods, reduction of freshwater consumption (i.e., water reuse and use of seawater), and the use of renewable energies (primarily photovoltaic and wind). Also, the new projects to be developed are expected to generate local value and productive intertwining.

6. Modernization of the institutional framework.

The regulations governing oversight bodies and the relationship between central decisions and regional and local governments will be under scrutiny. Following an initial assessment, a proposal for institutional modernization will be presented during the first half of 2024 in order to allow the development and growth of the industry, giving coherence to existing and new agencies.

Currently, the Chilean Nuclear Energy Commission (CCHEN), the Ministry of Mining, CODELCO, ENAMI, the Bureau of Waters (DGA), and the environmental authority, especially the Environmental Evaluation Service (SEA) and the Superintendence of the Environment (SMA), are the main participants in the lithium industry. The challenge for the NLE will be to make coherent the role that CCHEN currently has with respect to the granting of authorizations, the participation of the Ministry of Mining, which currently grants the CEOLs, and the role that the current and new state-owned companies will have.

7. Generation of an innovation and development policy for the lithium industry.

A Public Research and Technology Institute for Lithium and Salt Flats will be created during the first semester 2024, which will ensure the generation of knowledge and technologies to improve the processes of extraction, production, value addition, applications, and recycling, combining these capabilities with efforts in research and environmental protection.

Also, the NLS will seek to increase the understanding of the salt flats by generating models that minimize the impact associated with lithium operations through the construction of public baselines. In that sense, a resource survey and other environmental components will be carried out by private and state-owned companies.

**Law for Nature: Creation of the Biodiversity and Protected Areas Service**

On June 14, 2023, Congress approved the Law for Nature, which creates the Biodiversity and Protected Areas Service (SBAP) for the protection of the country's terrestrial and marine nature.

Approval of this initiative will not only increase the annual budget allocated to environmental institutions by almost 58%, but will also increase private participation in the management of protected areas and double the number of park rangers. This will also allow for a more efficient use of resources, avoiding the current dispersion of institutions, officials, patrols, uncoordinated monitoring, and duplication of vehicles, tools, and instruments, among other situations.

Also, the creation of the Biodiversity and Protected Areas Service considers the transfer of all protected areas administered by the National Forestry Corporation (Conaf) to the SBAP, along with its financial and personnel resources, safeguarding their labor rights. In this way, SBAP will be built on the knowledge accumulated in Conaf over decades. It will also recognize the contribution of private protected areas to conservation, integrating them into the national system of protected areas. This implies, on the part of SBAP, overseeing the administration of privately owned protected areas, providing support, and offering incentives, such as tax exemptions.

The Law for Nature is fundamentally based on four pillars, which are (1) to create a robust public service that will be in charge of biodiversity protection; (2) to address the institutional dispersion of protected areas that, until now, were distributed among more than five public services, causing a disjointed management; (3) provide the country with management instruments for biodiversity conservation throughout the national territory—inside and outside protected areas—such as the identification of priority sites for biodiversity, ecological restoration strategies, and wetland protection; and (4) strengthen regulations and provide robust and efficient financing for conservation.

Chile stands out for its large surface of marine (42%) and terrestrial (22%) protected areas.

This bill is currently being reviewed by the Constitutional Court. After that, the initiative will be ready for enactment and publication.

From its publication, there is a period of one year to issue the Decree with Force of Law for the creation of the SBAP, which will allow defining the administrative aspects that will give shape to it, such as, for example, establishing the personnel, remuneration scales, among others.

**New Storage and Electromobility Law**

On November 21, 2022, Law Nº 21,105 on Storage and Electromobility was enacted, which amended the General Law of Electric Services with the aim of achieving the decarbonization goals proposed by our country, through a more sustainable use of renewable energies.

This law introduces the concept of storage systems, thus seeking to help the decarbonization goals by having a more sustainable use of renewable energy, seeking to encourage companies to store energy.

It also introduces modifications with the purpose of considering storage systems within the generation market, being able to participate in the transfer of energy and power, which will allow the development of different technologies (batteries, compressed air, among others) and allow a better integration of variable generation sources, such as solar and wind energy.

Specifically, this law enables pure storage projects, i.e., those systems that do not have a source of energy generation, but only store it, so that it can be injected into the electricity system and be available at times of peak demand, thus allowing to obtain the corresponding remuneration. This will be deter-

mined by regulations that will establish the prices to be applied when the storage systems are directly connected to national, zonal, or distribution system facilities, as well as the price stabilization mechanisms (when the power surplus does not exceed 9,000 kW) and the way in which the dispatch and coordination of the systems will be done by the National Energy Coordinator (Chilean equivalent to the U.S.'s ISOs), which will be dictated within a period of one year from the publication of the law.

Likewise, the incorporation of "generation-consumption" systems is recognized, which correspond to a productive infrastructure destined to purposes such as hydrogen production or water desalination, with its own generation capacity, through renewable generation means, which is connected to the electric system through a single connection point and can withdraw energy from the electric system through a supplier or inject its surpluses. On this point, the corresponding charges associated to final customers will only be based on the energy and power withdrawn from the system and not for the energy and power self-supplied. It also makes applicable the provisions corresponding to generating plants and final customers not subject to price regulation, which will be determined through a regulation to be issued within one year from the publication of the law.

Another novelty regarding this law is the consideration of electromobility, through the incorporation of an exemption from the payment of the circulation permit for two years, for those electric and hybrid vehicles with external electric recharging, as well as others qualified as zero emissions by exempt resolution of the Ministry of Energy. At the same time, it incorporates a progressive reduction in the payment of the circulation permit for electric vehicles during the six years following the established exemption. Finally, these electric vehicles are recognized as "storage equipment", thus being able to participate in the electricity market.

The Chilean energy transition process has been based on three fundamental pillars:

1. Enabling infrastructure: composed of works of national interest that allow the promotion of local productive development, as well as the redefinition of organizations in expansion plans.
2. Territorial planning and organization: development poles with a much broader territorial scale and nationwide coverage.
3. Operation of emission-free electrical grid: installation of a highly renewable system, in coordination with the provisions of the Framework Law on Climate Change and related regulation.

It is still necessary for the Ministry of Energy to issue the respective regulations on this law (especially the Sufficiency Power Regulation), without which it will not be operational.

Hand in hand with the enactment of the Storage and Electromobility Law, the President of the Republic Gabriel Boric has announced a new tender for large-scale electric energy storage systems, which would involve an investment of more than US$2 billion in two 2 GW storage systems for four hours, which would be located in the Atacama Desert. This large-scale tender would take place in 2024.

**New Law of Economical and Environmental Crimes and Expanded Criminal Liability of Legal Entities**

On May 15, 2023, the Chilean Congress approved a bill that systematizes both economic crimes and crimes against the environment, which can be followed through Bulletin Nº 13204-07 and N° 13205-07.

The bill includes several categories of crimes, but we will only focus on the environmental crimes. This bill was originated in part because of the lack of existing legislation both in the Chilean Penal Code and in Law Nº 19,300, on General Bases of the Environment, with respect to penal figures that allows sanctioning activities committed against the environment.

The bill introduces penal figures that complies with this objective, being the environment the protected juridical good, understanding this in the same terms as Law Nº 19,300, that is, "the global system constituted by natural and artificial elements of physical, chemical or biological nature, socio-cultural, and their interactions, in permanent modification by human or natural action and which governs and conditions the existence and development of life in its multiple manifestations."

To this end, a new chapter is introduced to the Penal Code, called "Attempts against the Environment," where we can highlight the following aspects regarding new crimes related to the alteration of the environment:

1. Pollution crimes.

In the first place, a new criminal type is established for the contamination generated to the environment, typifying the ways of affecting the environment, alluding to the evasion or elusion of the control carried out by the administrative system and the effects deriving therefrom.

In this way, the concurrence of the criminal type of this crime requires additional requirements, such as the assumption that it is committed by whoever has not submitted his activity to an environmental impact assessment, knowing that he is obliged to do so.

Therefore, what generates punishability under this bill does not refer to the seriousness of the polluting activity or the fact that it alters the environment, but refers to the relationship of that activity with the administrative control system.

Likewise, it is understood that the crime of recidivism is possible, when these conducts are reiterated after the application of serious sanctions contemplated in the law.

2. Water extraction crime.

The extraction of water becomes punishable when this is committed in those areas declared as "water shortage areas," according to the relevant regulations of the Water Code, as well as the contamination of the same.

Therefore, it requires that the illegality of these actions is first determined by the corresponding administrative agency, which gives rise to the possibility of committing these crimes.

3. Crime of serious damage to the environment.

The punishable action is "serious damage to the environment," which is the material affectation of one or more environmental components or the adverse change produced in any of them. This crime considers circumstances based on territoriality, temporality, incidence, and seriousness of the damage caused.

Among those circumstances, a serious damage to the environment will be understood as producing an adverse change in species declared as protected, having prolonged effects in time or whose effects may cause a serious risk to people's health.

4. Ecocide.

Finally, it introduces a criminal offense for those situations in which irreversible damage is caused to an ecosystem in an area of considerable extension, which—without being expressly indicated in the law—can be understood as ecocide. The maximum penalties available are contemplated for this situation.

These amendments are not only directed to the Penal Code, but also to Law N° 20,417, which creates and regulates the Ministry of the Environment, the Environmental Evaluation Service, and the Superintendence of the Environment.

In this sense, sanctions are introduced for those cases in which false information is provided or obstruction of the supervisory work performed by these entities is incurred, therefore, all those obstructions to the process are sanctioned, so that a timely and effective control can be exercised by the relevant authority, in order to avoid the commission of these crimes.

Regarding liability, the Bill describes the situation of natural persons and legal entities.

(i) Liability of natural persons

The Bill creates a new system of mitigating and aggravating factors, and introduces a special regime of alternative punishment, which consists in the fact that probation ceases to operate and the cases in which conditional remission of the sentence is applicable are reduced.

Finally, it introduces the penalty of fine for economic crimes, under a regime of daily fines, as opposed to the general system of nominative fines. Under this new regime, the applicable fines can go as far as US$23 million.

(ii) Liability of legal entities

In addition to the catalog of new crimes and the legal consequences imposed on the natural persons who commit them, the bill includes an important reform regarding the liability of the legal person, regulated in Law N° 20,393.

Regarding fines and confiscation of profits, the same rules apply as for natural persons. The difference is in relation to the scope of application of the offenses, incorporating as a basis all the economic crimes that can be committed by a legal person contained in the preceding law.

Likewise, the scope of application of subjects that can be understood as perpetrators of crimes is broadened, incorporating State universities, political parties, and religious legal entities.

Regarding the particular case of crimes related to the environment, a new rule is established, changing the criterion of criminal imputation understood in Law Nº 20,393, since it will no longer be understood as responsible whoever is at the top of the administration of the legal person, but now it will be understood as responsible those who have intervened on behalf of the legal person in the commission of the punishable act.

Importantly, in order to avoid criminal liabilities, the legal entities shall adopt a complete model of crime prevention (MCP). This MCP will allow the company to be exempted from liability when it has been adequately and effectively implemented prior to the commission of the crime. If it is implemented after the criminal investigation, it may serve as a mitigating factor for liability. Also, the bill added some new requirements of the MCP, such as the existence of secure whistleblower channels, due training of collaborators, and the performance of periodic evaluations by independent third parties.

Finally, the penalty of fine is also constructed under a regime of daily fines, as opposed to the general system of nominative fines. Under this new regime, the applicable fines to legal entities can go as far as US$160 million.

*Joaquín Corvalán Azpiazu, Reporter*

**National Congress Approves New Royalty on Large-Scale Mining**

On May 17, 2023, the National Congress approved the Mining Royalty Bill (101 votes in favor, 24 against, and 3 abstentions), and it is about to become a Law of the Republic, with only the Constitutional Court's prior constitutionality control procedure pending.

This Mining Royalty will come into force on January 1, 2024 and seeks to raise tax revenue of approximately 0.45% of Chile's Gross Domestic Product (approximately US$1.4 billion), of which US$450 million will be given directly to the different regions and 89% of Chile's most vulnerable municipalities to boost their development, with a focus on their productive development, and with a view to strengthening decentralization policies.

Some important elements of this new royalty on large-scale mining:

(1) The tax to be paid by mining companies will be determined by the amount of sales they make, and the amount of minerals extracted. This tax will not increase the taxation of small mining (up to 12,000 tons per year of production) nor of medium mining (less than 50,000 tons per year of production).

(2) This special mining tax is established for the activity of those mining companies or operators with a production of more than 50,000 metric tons of fine copper per year. Two rates will apply (i) an ad valorem component with a 1% rate on annual sales; and (ii) a component on the mining operating margin, with rates between 8% and 26% on taxable income.

(3) Article 8 of the bill sets a limit or cap on the maximum potential charge, differentiated according to production level: (i) companies producing more than 80,000 metric tons of fine copper: 46.5% of the adjusted mining operational taxable income (RIOMA); (ii) companies producing between 50,000 and 80,000 metric tons of fine copper: 45.5% of the adjusted mining operational taxable income (RIOMA).

A Regional Fund for Productivity and Development will be created, with the aim of injecting resources into projects aimed at promoting productive activities at a regional and local level and promoting scientific research and technological development.

**Chile Rejected the Draft of the New Constitution Through a Plebiscite—Statute on Natural Resources, the Environment, and Indigenous Rights of the 1980 Constitution Remains in Force**

Constitutional Context

On September 4, 2022, the Draft of the New Constitution, which was drawn up during 2021 and 2022, was submitted to a plebiscite by popular vote. The results of September 4 were 62% for the option "Reject," with the option "Approve" reaching 38%. Consequently, and to date, the 1980 Constitution remains in force in Chile, substantially reformed in 1989 and 2005—among dozens of other modifications.

As context, it is worth remembering that in October 2019, a large-scale social uprising began in Chile, which led to political and social instability of great proportions, violence, and a very significant political crisis. Part of the solution to this political

and social crisis in 2019 was channeled through an agreement between almost all of Chile's political forces to promote a constituent process that would culminate in a plebiscite ratified by the citizens.

However, the Constitutional Convention democratically elected for that purpose was not successful in its task of drafting a New Constitution that would convince Chileans to approve it. It is not the purpose of this report to analyze the general content of that Draft of the Political Constitution, nor the causes that led to its rejection, but it is worthwhile to briefly review the main changes or innovations that the Draft contained in the constitutional regulation of natural resources, environment, and Indigenous law.

Summary of the Changes That Were Proposed in the Draft of the New Constitution, Rejected by the Public, Concerning the Constitutional Statute of Natural Resources, Environment, and Indigenous Rights

Regarding the constitutional statute of natural resources, the environment, and Indigenous law, the main innovations that this Draft of the New Constitution—already rejected—proposed, in summary, are the following:

i. In the area of Indigenous law: The State of Chile would have become a Plurinational and Intercultural State (art. 1). To this effect, the Draft of the New Constitution recognized 11 Indigenous peoples and nations: Mapuche, Yaghan, Rapa Nui, Quechua, Aymara, Lickanantay, Colla, Diaguita, Chango, Kawashkar, Yaghan, Selk'nam and others that may be recognized in the manner established by law (art. 5). The Draft also ordered the creation of Indigenous Territorial Autonomies (e.g., art. 187), which would have enjoyed political autonomy. It also innovated the concept of Indigenous peoples' juridical systems (e.g., art. 309), and enshrined prior consent (art. 191) for those matters that could affect their rights. It also innovated in the safeguarding and protection of the ownership of Indigenous lands (art. 79).

ii. In terms of natural resources:

1. The Draft of the New Constitution was innovative in terms of the human right to water, energy, and mining. Indeed, regarding water, the current 1980 Constitution enshrines the rights of individuals over water, recognized or constituted in accordance with the law, which grants their holders ownership over these rights. In contrast, the Draft of the New Constitution contemplated a Water Statute (arts. 140 and following), enshrining the human right to water, and also creating a new institutional framework through the incorporation of the National Water Agency, the body in charge of managing water resources. Water, as a natural common good, would be inappropriate (art. 134).

2. In energy matters, the Draft of the New Constitution recognized the right to energy (art. 59), enshrined concepts such as a vital minimum of affordable and safe energy and demanded that its development should have a low environmental impact, with a focus on renewable energies.

3. In mining, the system would be substantially modified since it created a Statute of Minerals (arts. 145 and following), and established that the State would have absolute, exclusive, inalienable, and imprescriptible dominion over all mines and mineral substances, but without including or recognizing the current system of concessions that allows private activity in the mining industry.

iii. In terms of the environment, the Draft of the New Constitution innovated substantially in comparison with the 1980 Constitution, since nature would become a right holder (e.g., art. 18), and the State and society would have to protect and respect it. The focus of this Draft was on nature as a holder of constitutionally recognized rights, and its existence, regeneration, maintenance and restoration of its functions and dynamic equilibrium had to be respected (art. 103). The State of Chile was recognized as an Ecological State (art. 1).

Next Steps

In view of the rejection of the aforementioned Draft, a New "2.0" Constitutional Process was initiated in Chile. To this end, a Commission of Experts, prominent jurists in the field of constitutional law, met and drew up a Preliminary Draft of the New Constitution and submitted it to the Constitutional Council, a democratically elected body, which must amend the Draft submitted by the Commission of Experts, with a deadline of December 2023.

In the end, it will be up to the citizens to decide whether to approve this new version of the constitutional proposal. If it is rejected, the 1980 Constitution will remain in force, with the current constitutional statute on natural resources and the environment remaining in force. Otherwise, if approved, a new statute will come into force in the areas indicated.

In the next issue of this *Newsletter*, we will comment on the main elements of the constitutional status of natural resources, environment, and Indigenous law that the New "2.0" Constitutional Draft will offer Chile.

**Chile and the European Union Signed Cooperation Agreements for the Development of the Green Hydrogen Industry**

On June 14, 2023, Ursula von der Leyen, President of the European Commission (the executive body of the European Union) visited the "Palacio de La Moneda," in Santiago (Chile), and was received by the President of the Republic of Chile, Gabriel Boric, and the Minister of Energy, Diego Pardow. This meeting took place in the framework of a series of visits that the President of the European Commission made to Latin America, where she met with the Presidents of Brazil, Argentina, Chile, and Mexico, with the aim of establishing strategic alliances between the European Union and the countries mentioned, with a view to the energy transition.

In the specific case of Chile, Ursula von der Leyen presented a fund of 225 million euros to Chile with the aim of promoting the green hydrogen industry. The visit was also aimed at strengthening ties for the new EU agenda of reinforcing relations between the EU and Latin America and the Caribbean, which will be discussed at the CELAC-EU Summit in Brussels on July 17 and 18, 2023.

In particular, the €225 million fund will be used for two projects. The first is the "Team Europe Project for the Development of Renewable Hydrogen in Chile"; and the second is the "Team Europe Renewable Hydrogen Fund in Chile." These two projects are part of the European Union's investment and partnership strategy "Global Gateway," a worldwide strategy by the European Union to invest in infrastructure projects and establish economic partnerships, for which an investment of around 10 billion euros is envisaged for Latin America and the Caribbean.

# COLOMBIA

*Janine Acosta, Reporter*

**New Mining Policy**

In judgment of August 4, 2022, the Council of State, in Popular Action Nº 25000234100020130245901, decision clarified and added by order of September 29, 2022, in the seventh paragraph of the third order, ordered the Ministry of Mines and Energy and the Ministry of Environment and Sustainable Development to update the National Mining Policy to include actions to counteract the problems related to: (1) the insufficient mining-environmental territorial planning; (2) the institutional disarticulation; and (3) the weaknesses of the control and supervision model of mining titles.

In compliance with this ruling, the national government through the Ministry of Mines and Energy (the "Ministry") proposed a new National Mining Policy entitled "A New Vision of Mining in Colombia." The purpose of this new policy is to redirect the mining activity in Colombia by adopting a comprehensive systemic approach. This approach encompasses environmental, productive, social, economic, and cultural aspects, among others, to ensure the appropriate use and reasonable exploitation of minerals in the territory, for the benefit of the territory itself.

The new policy is based on six approaches that are recognized as a set of transversal guiding elements. These approaches respond to and align with international scenarios and other sectoral policies:

1. Human rights approach: aims to ensure that the institutional framework of the mining sector to create the conditions to prevent, mitigate and redress violations to the effective enjoyment of the rights of people and the environment, as a consequence of the mining activity.
2. Gender approach: aims to promote, articulate and strengthen the initiatives oriented to the integration of the gender approach from the labor and community dimensions. Specifically, in the community sphere, it is necessary to achieve impact actions that include the capacity of strengthening on rights, women's empowerment, economic resilience, gender-based violence, alternative or responsible masculinities, among others.
3. Differential approach: aims to promote that the participation scenarios and mechanisms are inclusive and comply with international standards associated with prior consultation and free, prior and informed consent.
4. Integrated climate change management approach: focuses on the transition to clean energy, circular economy and a technical closure and post-closure process that takes into account the productivity of the area.
5. Systemic approach: aims to guarantee the articulation between actors, processes and settings that are connected to the mining activity.
6. Environmental management and responsible production: aims to go from an extractive model to a productive model.

Additionally, the mining policy document identifies 10 problems associated with mining in Colombia. For each problem, the policy outlines a strategic line of action:

1. Inadequate mining-environmental planning: The Ministry aims to improve the availability of environmental and mining information within the next five years. It intends to prioritize environmental and mining planning by creating exclusion zones and management plans in protected areas.
2. Weak institutional articulation for decision-making: The Ministry seeks to unify technical criteria, integrate information through a technological interface, and design strategies for coordinating mining, environmental, and territorial authorities across sectors.
3. Weaknesses in granting, control, monitoring, and supervision of mining activities: The Ministry acknowledges the lack of sovereignty over non-renewable natural resources under the current Mining Code's mining concession contracts.
4. Insufficient social participation: The Ministry proposes strengthening participation mechanisms in the granting of mining titles and environmental licensing. It also aims to manage and handle conflicts arising from mining activities effectively.
5. Lack of actions to promote formalization and recognition of ancestral, traditional, and small-scale mining: The Ministry plans to formalize ancestral mining and strengthen it through better production practices. It aims to promote social inclusion and associativity.
6. Insufficiency of national geoscientific knowledge: The Ministry proposes the creation of the National Plan of Geoscientific Knowledge to provide geological and geoscientific information for planning and natural resource utilization.
7. Weak mechanisms for promotion, accompaniment, and business development in the value chains and industrialization of the sector: The Ministry proposes encouraging the transition to sustainable energy sources, improving related infrastructure and services, supporting suppliers, exploring new resource utilization methods, maintaining existing infrastructure, adjusting criteria for strategic mining area allocation, implementing due diligence measures, ensuring product traceability, and considering the establishment of a state company dedicated to mining.
8. Insufficient implementation of good mining practices, including circular economy principles and best available techniques: The Ministry will develop mandatory reference documents with detailed technical descriptions required for mining projects.
9. Weaknesses in the planning and mine closure process: The Ministry aims to reform mining regulations to efficiently manage mine and environmental closure. This involves regulating article 24 of Law 1753 of 2015, updating the Terms of Reference for the Mining Closure Plan, integrating comprehensive mining and environmental closure activities with contractual stages in intervened areas, accessing relevant information, and implementing necessary resolutions.
10. Illegal mineral exploitation: The Ministry proposes comprehensive action plans to raise awareness among authorities and mining communities, improve the monitoring system, implement traceability mechanisms, and support the creation of an Intersectoral Committee against unauthorized exploitation.

The policy also suggests monitoring and evaluation indicators to be implemented by various entities such as the Ministry

of Mines and Energy, the UPME (Mining and Energy Planning Unit), the Ministry of Environment and Sustainable Development, the National Mining Agency, and the Colombian Geological Institute, among others. The execution of the mining policy will involve the competent departments of the Ministry, affiliated and related entities, and collaboration with other entities, primarily from the environmental sector.

It is important to note that the above document is part of a draft published for public comment.

In conclusion, the proposed "A New Vision of Mining in Colombia" policy represents a significant step towards addressing the challenges and shortcomings in the country's mining sector. By adopting a comprehensive systemic approach, the policy recognizes the importance of considering environmental, social, economic, and cultural factors in the development of mining activities. It aims to ensure the responsible and sustainable use of Colombia's mineral resources while safeguarding the rights of individuals and protecting the environment.

It is worth noting, that the proposal must respect the acquired rights of both national and foreign mining companies already operating in the territory. Additionally, the policy should ensure legal stability. Also, it should be highlighted that this policy presents concrete and clear actions to address the challenges currently faced by the mining sector. Furthermore, it appears that the government is committed to complying with the Council of State's ruling.

*Tomás de la Calle, Reporter*

**Increase of the Government-Take on the Extractive Sector in Colombia**

On August 2022 a new government took office in Colombia. A key policy flagship of such leftist government while campaigning was to speed up the energy transition away from fossil fuels. Thus, its first legal initiative was a tax reform bill that passed into law in December 2022: "*Law # 2277 by means of which a tax reform for equality and social justice, and other provisions are adopted.*" The aim of such Law is to increase taxes to the extractive sector in general, but more intensively to companies producing crude oil and coal. A tax reform is hardly surprising news in Colombia where 13 fiscal reforms have been passed since the year 2000 which averages to about a reform every two years! What proves new in this reform, though, is that the extractive sector will bear the lion's share of the US$4.6 billion intended tax collection, that is, US$2.6 billion or circa 56% (*Note: the intended tax collection of every reform should be understood as the additional taxes that each one is aimed to achieve on top of the prevailing fiscal regime.*) The US$2.6 billion amounts to 1.3% of Colombian GDP raising the total tax collection to around 13% of GDP.

Thus, the purpose of this report is to describe the two main changes introduced by this tax reform and their implications on the hydrocarbons and mining sectors. The first change refers to a surcharge on the corporate income tax (CIT) that both oil and mining companies will be subject to according to the commodities price; and the second one deals with the way royalties are to be treated to compute the taxable income.

Strictly speaking the CIT surcharge stipulated by the Law focuses on just two commodities deemed to be enjoying windfall profits: crude oil and coal. As a context, the domestic production of the former amounted to 59 million tons in 2022 of which US$12 billion equated to exports. Regarding crude oil, the domestic production in the same year averaged 754 thousand barrels per day (mb/d) of which US$19 billion were exported. Since total Colombian exports attained US$57 billion (2022), coal and crude oil represented 21% and 33% of total exports, respectively.

The natural gas lobby group (Naturgas) did a very good job by managing to exclude this sector from any CIT surcharge: it profusely argued that natural gas, being the "transition fuel," should not bear any surcharge. In regard to the other change addressed by the Law, the treatment of the royalties, it applies across the board to all the extractive sectors: crude oil, natural gas, coal, gold, nickel, etc.

CIT Surcharge

Crude oil: The procedure established by the Law compares the average Brent oil price of the pertaining fiscal year (the first being 2023) with the preceding 10 years on a monthly basis; according to such comparison a CIT surcharge of 5%, 10%, or 15% would be set, as follows:

i. If the average 2023 Brent price falls between 30th and 45th percentile the 5% CIT surcharge would apply, that is, total CIT would be 40% (= 35% + 5%);

ii. If the average 2023 Brent price falls between 45th and 60th percentile the 10% CIT surcharge would apply, that is, total CIT would be 45% (= 35% + 10%); and

iii. If the average 2023 Brent price ends up being higher than 60th percentile the 15% CIT surcharge would apply, that is, total CIT would be 50% (= 35% + 15%)

Just to be sure, if the average 2023 Brent price falls below the 30th percentile there would be no CIT surcharge.

Fortunately, enough, the Law mandates the National Hydrocarbons Agency (ANH in Spanish) to work out such percentiles and officially publish them; they did so (Resolution N$^{o}$ 0181 of Mar.1, 2023) and the results are: 30th percentile: US$65.43/bl; 45th: US$73.17/bl; and 60th: US$79.92/bl. The average Brent oil price for the first half of 2023 is going to be in the region of US$80/bl; if this were the case for the whole 2023, the applicable CIT for this fiscal year would be 50%. As an example, if it were US$75/bl, CIT would be 45%; if it were US$66/bl, CIT would be 40%; below US$65.4/bl, CIT would be 35%.

Coal: In this case, the rationale and methodology are identical to the one discussed for the case of crude oil, but the percentiles and CIT surcharges vary, as follows: below 65th percentile there would be no CIT surcharge; between 65th and 75th percentiles, the CIT surcharge would be 5% (hence, total CIT: 40%), and above 75th percentile CIT surcharge would be 10% (CIT total: 45%). In this instance, the Law mandates the Mining and Energy Planning Unit (UPME in Spanish) to calculate and publish such percentiles. The UPME published them but "unofficially" in the sense that they just published a draft for comments, and afterwards indicated they will publish them officially (i.e., via a Resolution) next year when they are actually needed to compute the applicable CIT for 2023 fiscal year. Thus, only for reference to the reader, what they published was: 65th percentile: US$87.03/ton, and 75th percentile: US$92.32/ton; they also pointed out that 2022 average had been US$276.88/ton. The specific coal to be used in computing the data corresponds to reference "API2," and the prices to be computed correspond to the prices of API2 coal minus BCI7 reference shipping (API2 – BCI7).

Royalties Treatment

Since this is a rather complex topic, an example will be used to better illustrate it. The following table presents the basis used to compute the taxes before the introduction of the Law (so the CIT surcharge effect is not captured). It also presents the case for an oil company producing crude oil, and for a mining company producing coal:

Fiscal Regime for an Oil Company and a Mining Company
Before Law # 2277 / 2022

| **Oil Company @ Crude Oil** | | | |
|---|---|---|---|
| Gross Production: | 10 mmbls | | 1 |
| — Royalties (@ 20%): | 2 mmbls | | 2 |
| Net Production: | 8 mmbls | | 3 |
| *Wellhead Price:* | *US$100/bl* | | 4 |
| OilCo Sales: | MUS$800 | *= 8x$100* | 5 |
| — Opex (@US$30/bl): | MUS$300 | *= 10x$30* | 6 |
| — DD&A (@US$20/bl): | MUS$160 | *= 8x$20* | 7 |
| | | | 8 |
| Taxable Income: | MUS$340 | | 9 |
| — Tax (CIT @ 35%): | MUS$120 | | 10 |
| Profits After Tax : | MUS$220 | | 11 |

| **Mining Company @ Coal** | | | |
|---|---|---|---|
| Gross Production: | 10 mmtons | | 1 |
| | | | 2 |
| | | | 3 |
| *Pithead Price:* | *US$100/ton* | | 4 |
| MiningCo Sales: | MUS$1.000 | *= 10x100* | 5 |
| — Opex (@US$30/ton): | MUS$300 | *= 10x30* | 6 |
| — DD&A (@US$20/ton): | MUS$200 | *= 10x20* | 7 |
| — Royalties (@ 10%): | MUS$100 | *= 1x100* | 8 |
| Taxable Income: | MUS$400 | | 9 |
| — Tax (CIT @ 35%): | MUS$140 | | 10 |
| Profits After Tax : | MUS$260 | | 11 |

Oil Company Economics: Since Ecopetrol (the Colombian Oil Company, 88% State-owned) takes the royalties of most of the oil producers in kind (i.e., the barrels), such producers do not compute royalties at all; they start their Profit & Loss - P&L calculation (so to speak) with ‘‘Net Production” (see row number 3 in the table above).

Mining Company Economics: Since there is not a coal state-owned company in Colombia that could take physical delivery of the royalties, the coal producers are in charge of marketing and selling all the production, including the volumes corresponding to royalties (1 million tons in the example or 10% of the gross production). In this case the producers start their P&L with Gross Production (row number 1) but further down they used to deduct royalties as a cost since they have to transfer to the government the value of the royalties (US$100 million) sold by them.

In summary, royalties used to be deductible (as a cost) in the case of mining companies since they were an income perceived by them but afterwards transferred to the government. On the other hand, the “deductibility” of royalties used not to be an issue for oil companies since they were not in charge of selling the royalties’ volumes.

What the Law introduced was the concept of “non-deductibility” of royalties for any company producing non-renewable resources (hence liable of paying royalties). Thus, using again the example provided in the table above, the economic for each type of company would be:

Mining Company Economics after the Law: The effect on taxes in this case is relatively straightforward: since royalties cannot be deducted, the Taxable Income would be US$500 million instead of US$400 million, and so, taxes would be US$175 million (versus US$140 million, a 25% increase).

Oil Company Economics after the Law: In this case, and given the royalties are paid in kind, the Law resorted to an “artifice”: oil companies must record royalties as a higher income in their accounting systems, and of course, they are not allowed to deduct them as a cost or as a expense. But an additional issue emerges here: What is the price at which in-kind royalties should be valued? The Law stated that they should be valued at “production cost” (rather than at market value) and it set the methodology to estimate such production cost. Going back again to the example, and assuming a production cost of US$50/bl (half the market value) the Taxable income would be US$440 million (= US$800 million + US$100 – US$300 million – US$160 million) instead of the US$340 million before the Law; it means that taxes would be US$155 million (versus US$120 million, a 29% increase).

Note than in both cases (coal and crude oil) the “non-deductibility” effect on royalties may very likely combine with the CIT surcharge, hence magnifying the tax burden. Also note that the ‘‘non-deductibility” treatment of royalties has been sued before the Constitutional Court by various companies, however, none of them have been ruled out yet.

In conclusion, the most influential think-tank in Colombia (Fedesarrollo) estimates that the combined effect of royalty treatment plus CIT surcharge would bring the effective tax rate from 36% (before the Law) to 70% (after the Law) in the case of crude oil (considering the 15% CIT surcharge). In the case of coal, it would mean a jump from 34% to 82% (assuming the 10% CIT surcharge).

On top of this, the government has decided not to grant any new areas for oil exploration, that is, not to sign up any new E&P contract, not even with Ecopetrol. It means that new oil discoveries, if any, should come exclusively from blocks awarded by ANH before August 2022 (about 330 contracts according to ANH).

The mid- to long-term outcome of this energy policy of higher government-take combined with no awarding of new exploration areas is yet to be seen. However, it all points out to discourage the development of the extractive sector while promoting the transition to renewable energy. Such a policy may be a good one in the long run, but in the short to medium term it

may prove dangerous since crude oil and coal are still way too important for the fiscal and forex stability of the country.

## ECUADOR

*Rafael Valdivieso & Analía Andrade, Reporters*

**Ecuadorians Vote to Indefinitely Suspend Oil Production from National Park**

As a result of the Constitutional Court favorable decision in ruling Nº 6-22-CP/23 issued on May 9, 2023, and the National Electoral Council (CNE) pronouncement Nº PLE-CNE-1-27-9-2022 executed on September 27, 2022, Ecuadorian citizens went to the polls this August 20, 2023. After a rigorous constitutional procedure pursuant to articles 104 and 106 of the Constitution and articles 104, 105, and 127 of the Organic Law of Jurisdictional Guarantees and Constitutional Control, citizens had to vote on a crucial plebiscite (hereinafter the "Plebiscite") that defined whether to continue the exploitation of the crude oil in block 43, located in the National Park Yasuní ITT (ITT), or to keep the oil from the referred block indefinitely in the subsoil.

The question citizens voted at the Plebiscite was the following: *Do you agree with the Ecuadorian Government decision to indefinitely retain the ITT crude, known as Block 43, beneath the subsurface? Yes or No*.

History of Oil Exploitation in Block 43—ITT Territory

Exploitation of block 43 has been a constant legal, economic, and environmental national dispute since it comprises one of the areas with the greatest diversity per square meter of the planet and is also the habitation and development land of the Indigenous community Huaorani and others that remain untouched. In 1989 the United Nations Educational, Scientific and Cultural Organization (UNESCO) named the ITT as a National Park and Biosphere Reserve.

Therefore, on February 2, 1999, through Executive Decree Nº 552 (published in the supplement to the official registry N$^{o}$ 121) the ITT territory was declared as Intangible Conservation Zone. Hence, the decree ordered to perpetually close the zone to any type of extractive activity. Subsequently, aiming to continue with the conservation of the area, by January 16, 2007, Executive Decree Nº 2187 (published in Official Gazette Nº 1) limited the Intangible Conservation Zone to 758,051 hectares.

Notwithstanding, the debate arises as the area declared as Intangible Conservation Zone is the most projected oil area of Ecuador. Over this point it is important to remark that Ecuador is an oil producing country for more than five decades, and its first exportation product is hydrocarbons. In 2022, oil exports accounted for US$10,013.12 million in Ecuador's revenues. Ecuador Cent. Bank, "Análisis Del Sector Petrolero, Resultados Al Cuarto Trimestre De 2022" (Feb. 2023), https://contenido.bce.fin.ec/documentos/Estadisticas/Hidrocarburos/ASP202204.pdf.

On the other hand, article 407 of the Constitution prescribes that extraction of non-renewable resources is prohibited in areas declared as intangible, and exceptionally, such resources may be exploited at the substantiated request of the Presidency of the Republic and after a declaration of national interest by the National Assembly.

Afterwards, on August 23, 2013, the Ecuadorian President issued the legal document Nº T.4980-SNJ-13-719 which requested the National Assembly: "to declare the oil exploitation of blocks 31 and 43, within the Yasuni National Park of national interest, in accordance with the aforementioned grounds . . . ." By means of a legislative resolution published on October 22, 2013 (Official Gazette Nº 106), the National Assembly declared of national interest the exploitation of blocks 31 and 43, in an extension no greater than one per thousand of the current surfaces of ITT with the purpose of complying with the primary duties of the state, to guarantee the rights of people and nature in order to have a good living. The beforementioned legal document excluded the oil exploitation activities in the Intangible Conservation Zone delimitated by Executive Decree Nº 2187.

However, as Ecuador is a democratic Republic in accordance with article 1 of the Constitution, which proclaims the nation is a "social and democratic state of rights and justice," a variety of legal disputes and complaints emerged regarding the controversy whether nature conservation prevails over oil industry or not.

Ecuadorian Plebiscite Regulation

Pursuant to article 104 of the Constitution, there are two requisites a citizen must comply to request the call for a nationwide plebiscite: (1) have a signed petition supported by no less than 5% of individuals registered in the electoral roll, which shall be approved through a CNE certificate, and (2) have a prior favorable ruling from the Constitutional Court about the introductory recitals and the constitutionality of the proposed questions. *See* art. 438, subsection (2) of the Constitution. The first requisite acts as a validation to the democratic legitimacy which proves the consensus to raise an issue into a plebiscite.

Back in 2013, the Constitutional Court issued ruling N$^{o}$ 001-13-DPC-CC on September 25, 2013, which determined that the applicant had to first obtain the signed petition to comply with the democratic legitimacy and request to the CNE the corresponding certificate to prove this first requisite. Subsequently, the CNE shall submit to the Constitutional Court the favorable certificate of the fulfillment of the democratic legitimacy together with the petition for the Plebiscite. Hence, the Constitutional Court is responsible for the second requirement detailed in the previous paragraph, regarding the favorable opinion on the recitals and the question to be consulted.

Notwithstanding, because of the prerequisite to first complete the democratic legitimacy, the beforementioned ruling was declared adverse to the constitutional participation right as it hinders citizens' initiative.

As a response, on April 16, 2019, the Constitutional Court issued ruling Nº 1-19-CP, which replaced ruling N$^{o}$ 001-13-DPC-CC and proclaimed that the Constitutional Court will first proceed to carry out the constitutional control of the introductory recitals and questions of the plebiscite, without requiring the CNE certificate about the endorsement of the signed petition. Thereafter, if the questions are framed within the constitutional text, the Constitutional Court will notify its opinion to the CNE, who are responsible to provide the petitioners with forms for the collection of signatures and verify the requirement of electoral support and democratic legitimacy to thereupon issue the corresponding certificate to proceed with the nationwide plebiscite.

History of the Plebiscite Regarding Oil Exploitation in Block 43—ITT Territory

The Plebiscite request initiated 10 years ago, on August 22, 2013, identified as Constitutional Court case Nº 2-13-CP. The Plebiscite was subject to ruling N$^{o}$ 001-13-DPC-CC, and so the petitioners first collected the signatures of the petition to comply with the democratic legitimacy requisite, and afterwards submitted the petition to the CNE and to the Constitutional Court. In the petition, the representative of the environmentalist collective named *colectivo Yasunidos,* asked these two regula-

tory authorities to conduct the democratic pathway to decide if the Ecuadorian crude oil of the block 43 shall maintain indefinitely underground. Please note the petitioners specified block 43 but not block 31.

As a response, on May 8, 2014, the CNE issued resolution Nº PLE-CNE-2-8-5-2014 in which the CNE informed the Constitutional Court that the requirement of democratic legitimacy has not been met by the *colectivo Yasunidos*. Thereupon, by February 2015 the Constitutional Court dismissed case 2-13-CP.

As mentioned before, due to the National Assembly resolution published on October 22, 2013, the activity of extraction in blocks 31 and 43 was intended to initiate simultaneously as the Plebiscite was following the corresponding legislative process. In this sense, by 2014 the Hydrocarbon Secretary (the Ministry of Energy and Mines at the time) enacted Resolution N° 19 which assigned the ITT oil blocks to the Ecuadorian national oil company, EP Petroecuador (NOC), to be responsible for the corresponding extraction. As a result, the exploitation initiated in 2016, when the declaration of national interest, filed in the beforementioned legal document N° T.4980-SNJ-13-719, entered into force. As of the current date, US$1.952 billion has been invested in oil facilities and infrastructure as informed by the NOC. *See* https://www.primicias.ec/noticias/elecciones-presidenciales-2023/pregunta-consulta-popular-yasuni-petroleo/.

Referendum Regarding the Oil Exploitation in the ITT

Because of the extractive activities initiated in the ITT, Ecuadorian citizens were concerned for the Intangible Conservation Zone. Thus, on February 4, 2018, a national referendum (aside from the Plebiscite request) was held in Ecuador, and within the various questions, number seven queried: *Do you agree to increase the intangible zone by at least 50,000 hectares and reduce the oil exploitation area authorized by the National Assembly in Yasuní National Park from 1,030 hectares to 300 hectares? Yes or No.* The results were in favor of the "yes" vote. As a result, Executive Decree Nº 751 was enacted on June 11, 2019 (published in the Official Gazette Nº 506), to revoke Executive Decree Nº 2187 and redefine the new boundaries of the ITT intangible zone and its buffer. Notwithstanding, Executive Decree N° 751 was challenged as unconstitutional, to which the Constitutional Court, on January 19, 2022, issued sentence Nº 28-19-IN/22 in which it resolved to partially accept the public action of unconstitutionality according to the form of articles 3, 4, 5, 6, 8, and 9 of Executive Decree Nº 751 and to remain in force those same articles from Executive Decree Nº 2187. Hence, the Intangible Conservation Zone of the ITT was expanded to reduce the area of the extraction activities.

Current Context of Block 43

Approximately 55,000 barrels of crude oil per day are currently extracted from block 43, equivalent to 11% of national production. *See Daily* Petroleum and Natural Gas Production, Report GTRCH.GEERIH.02.FO.01. In other words, from the current 19 oil blocks operated by the NOC, block 43 is the fourth with the highest production, after oil blocks 57 (Shushufindi), 60 (Shacha), and 61 (Auca). Likewise, each year, oil production in the ITT represents a national income of approximately US$1.2 billion. *See* Press Release, EP Petroecuador (June 23, 2023), https://www.eppetroecuador.ec/?p=18015. Additionally, the NOC announced in the beforementioned press release that the ITT has generated a revenue of US$4.224 billion for the Republic in the last eight years.

Fight Against the Plebiscite Continues and the CNE with the Constitutional Court Comes into Play

Nevertheless, the impugnation's for the Plebiscite admission held by the *colectivo Yasunidos* continued. As a result of a long judicial and administrative pathway with an extraordinary protective action in between, the CNE issued resolution N° PLE - CNE-1-279-2022 on September 27, 2022, in which it granted the certificate of democratic legitimacy in favor of the *colectivo Yasunidos*. Subsequently, the Constitutional Court in October 2022 opened case Nº 6-22-CP/23, in which the Court examined the following aspects: (1) the corresponding *jurisdiction* to resolve a prior favorable ruling about the introductory recitals and the constitutionality of the Plebiscite; (2) the *colectivo Yasunidos active legitimacy* (according to the article 104 of the Constitution and paragraph 5 of Constitutional Court ruling 1-21-CP/21 issued on June 23, 2021, any citizen is entitled to file a request for a constitutionality opinion on a proposal to call a referendum); (3) the analysis of the *legal issues* that will arise from the Plebiscite and the recognition that both the factual and legal circumstances of ITT exploitation have changed significantly over the past 10 years; (4) the *counter effects* of the Plebiscite if the answer "yes" prevails, including the infringement upon legal certainty and the international relation breaches; and (5) the *formalities* of the Plebiscite including the subject and the democratic congruence. Regarding this last aspect, the Court deliberated that even though article 1 of the Constitution acclaims that the non-renewable natural resources of the territory of the state are inalienable patrimony and imprescriptible, the exclusive jurisdiction of the government over these resources should not be construed as precluding the right of citizens to be consulted. *See* Ruling Nº 6-22-CP/23, para. 74.

Constitutional Court Decision in Ruling N° 6-22-CP/23

As a final decision of a meticulous analysis, the Constitutional Court decided to issue a favorable ruling on the recitals and the constitutionality of the Plebiscite proposed question. As well, the Court consider that as the petitioners did comply with the democratic legitimacy requisite according to the CNE certificate, and so the *colectivo Yasunidos* will not be required to duplicate the process of the signed petition. Thereupon the Court order to proceed in accordance with the Plebiscite process prescribed in the Constitution and the Democratic Code.

Dissenting Votes of the Constitutional Court

From the nine Constitutional Court judges, three had a dissenting vote from ruling Nº 6-22-CP/23. The principal arguments revolve on the adjustments that have occurred during the last decade in block 43, leading to the conclusion that the context of the Plebiscite is obsolete, and so new recitals should be considered. In first place the circumstance of the ITT block has changed because it has been exploited for the last seven years and the delimitation of territory to be exploited has been reduced in conformity to the referendum held in 2018. Hence, the arguments of the dissenting votes claim that the question of the Plebiscite is outdated as it was formulated in 2013, before the Presidency and the National Assembly resort to article 407 of the Constitution, by declaring the exploitation of the ITT as a national interest and consequently granting the operation to the NOC. The court judged that the Plebiscite question shall contemplate the *suspension* of the exploitation.

This leads to the second argument of the dissenting votes regarding the questioning of the democratic legitimacy. The signed petition was conducted in 2013, and so that would imply encroaching upon the volitional sphere of those citizens who submitted their supporting signature for a proposal that main-

tained a different factual and legal context, which could be considered a sort of fraud.

Conclusively, the third argument lies in the fact that if the "yes" vote prevails, it can violate legal certainty as it would unexpectedly impact third parties who, based on legal certainty upon article 407 of the Constitution, have undertaken decisions and actions that encompass the authorized petroleum operations in block 43. *See* Ruling Nº 6-22-CP/23, dissenting votes para. 49.

Results of the Plebiscite Held August 20, 2023

As a consequence of the democratic process, and pursuant to an accurate vote count, out of the 10,870,360 suffrages, the "yes" vote prevailed in the Ecuadorian ballot boxes with 58.95%. In contrast, the "no" vote had 41.05% votes. *See* CNE results, https://elecciones2023.cne.gob.ec/Consultas/yasuni.

These results imply that the exploitation of block 43 will be indefinitely suspended, and the NOC has one year since the notification of the official results from the Plebiscite to remove the infrastructure from the ITT. *See* Ruling Nº 6-22-CP/23, para. 90.

Implications and Effects of the Plebiscite Results

The NOC must adopt immediate measures for the remediation of nature, protection of the territory and neighbor communities, among other actions that must be executed through the different competent ministries, including the Ministry of Energy and Mines and the Environmental Ministry. Likewise, Ecuadorian government must entail international liabilities that could be incurred by the state as a consequence of the breach of the contractual relations entered into. These include the pre-sale of oil and the acquisition of goods to conduct the exploitation of the block. According to NOC document N° PETRO-CIN-2023-0614-M issued on April 20, 2023, it is detailed that a total of 101,880,000 barrels of oil are committed to international oil companies until December 2027. Thus, the state would have to take the necessary actions and evaluations to avoid breaching said contracts.

Additionally, the NOC declared that the costs assumed by the state as a consequence of the Plebiscite results would amount to US$16.470 billion, distributed as: (1) US$13.800 billion that the state would cease to receive in income over the next 20 years due to the non-extraction of the remaining reserves in the oil field; (2) US$467 million for the removal of the installations costs; (3) approximately US$251 million for social compensations the NOC would have to pay to the neighbor communities; and (4) US$1.952 billion from the investment beforementioned. *See* https://www.primicias.ec/noticias/elecciones-presidenciales-2023/yasuni-itt-consulta-popular-yasunidos-costo/. Likewise, the Ecuadorian Central Bank revealed that the non-exploitation of the ITT field would entail a reduction in gross income by US$17.635 billion, considering an average price of US$62.6 per barrel. In turn, the non-exploitation of the ITT would generate an income opportunity cost for the state of US$2.052 billion in returns. As an outcome of the Plebiscite, the non-exploitation of the block will generate an opportunity cost of US$14.709 billion. Ecuador Cent. Bank, "Estudio de los Impactos Macroeconómicos de Mantener el Crudo del Bloque 43-itt Indefinidamente en el Subsuelo" (Aug. 2023).

Two of the examined alternatives to offset the loss of the ITT revenues are: (1) to implement fiscal measures, such as increasing tax revenues or reducing fuel subsidies; or (2) delegate to a private company the Sacha field (block 60). *See* https://www.primicias.ec/noticias/economia/itt-yasuni-produccion-petroleo-consulta/.

In the legal sphere, the legislation will be amended as Executive Decrees Nº 2187 and Nº 751 will no longer have legal force as well as the National Assembly resolution that declares the ITT as a national interest according to article 407 of the Constitution.

By August 21, 2023, the Minister of Energy and Mines has announced that the Ministry is preparing the business closing plan, which shall be approved by the Environmental Ministry. The business closing plan elaboration would take approximately three months, for which purpose, the ITT will continue to operate for an additional of the same lapse of time.

Conclusions

As a result of the CNE issuance of the certificate of democratic legitimacy by September 27, 2022, and the Constitutional Court favorable decision in ruling Nº 6-22-CP/23 by May 9, 2023, Ecuador was subjected to democracy through the Plebiscite. By August 20, 2023, Plebiscite results in favor of the "yes" vote demonstrated that for the majority of the Ecuadorian population, environmental conservancy prevails over the extraction of the country's first exportation product.

It is the first time in the nation's history that an extractive activity must be abruptly suspended, so at the moment, Ecuador will be exposed to a variety of social, economic, legal, and environmental reforms that are still uncertain. EP Petroecuador, together with the Ministry of Energy and Mines and the Environmental Ministry, will collaborate jointly to comply with the Plebiscite and cease operations of block 43 indefinitely.

*Patricio Albuja, Reporter*

**Environmental Consultations of the Ecuadorean Legal Regime**

The Ecuadorean Constitution—enacted 2008 and currently enforceable—introduced three distinct rights for consultation enhancing environmental and Indigenous rights and updating the Carta Magna with international standards. Such rights have become a struggle for public and private companies especially in the mining, electricity, and hydrocarbon industries as they are usually required to comply when referred to activities that causes impact to the environment. Likewise, every Government as of 2008 has encountered obstacles to implement and regulate such rights. As it will be analyzed below, due to the lack of specific processes and regulations to implement these consultations, the Constitutional Court has stepped-in in order to breach that gap between what it is written and its execution.

The three consultation rights introduced in the 2008 Constitution are: (1) pre-legislative consultation; (2) environmental consultation; and (3) consultation to Indigenous communities.

Pre-Legislative Consultation

This consultation is established in article 57, numeral 17 of the Constitution as a right in favor of the Indigenous communities and nationalities to be consulted prior to the issuance of any regulation that may affect their rights as a group. It is also provided under international regulations: article 6, paragraph 1 of the Conference 169 of the International Labor Organization - Indigenous and Tribal Peoples Convention of 1989 and article 19 of the United Nations Convention on Indigenous Peoples Rights. In accordance with Ecuador's Constitution, human rights international norms shall be deemed as included as part of the rights of the Constitution and shall also be of direct application.

Furthermore, the Constitutional Court has determined in various rulings that the pre-legislative consultation is an obligation for the government to guarantee this collective right for the

Indigenous communities. The Constitutional Court has broadly interpreted the scope of what regulations shall be consulted. They have repeatedly interpreted them as any norm from the legislative branch or any other regulation that may affect an Indigenous community. *See* Constitutional Court Rulings N° 001-10-SIN-CC, N° 38-13-IS/19, and N° 69-16-IN /21.

The Constitutional analysis on pre-legislative consultations can be noticed in Ruling N° 45-15-IN/22, which declared unconstitutional a regulation as it did not comply with the pre-legislative consultation international standards. The law declared unconstitutional was the Water Law, Ley Orgánica de Recursos Hídricos, Usos y Aprovechamiento del Agua y su Reglamento, that directly affected Indigenous communities. Especially, the Court noted that this consultation shall be performed guaranteeing the participation of the communities involved under a culturally adequate procedure. The Court granted the government 12 months as of the issuance of this ruling to enact new regulations.

On November 2022, the President issued a Presidential Decree with a pre-legislative consultation procedure for any regulation issued by the executive power. Note that other regulations such as laws from the legislature and regulations from other powers of the government are not included in this procedure. This was issued as a response to the need of this procedure and that the National Assembly has not provided with a law until now that will cover a bigger scope of regulations and not only executive powers.

This executive decree was challenge for constitutional grounds by Indigenous organizations alleging that this regulation is required to be enacted by law and not by decree and that it would require a pre-legislative consultation. The latter may result in an oxymoron—the pre-legislative regulation required a pre-legislative consultation. This will ultimately lead to a question of what came first, the chicken or the egg.

Currently, Ecuador is waiting for the Constitutional Court resolution and see if they uphold the executive decree; but most importantly, waiting for a definitive law from the National Assembly that will settle the labyrinth the country is in. Any regulation or law requires a pre-legislative consultation is Indigenous communities are affected but are not able to be enacted since there is no procedure for it.

Consultation to Indigenous Communities

This consultation is a right provided by article 57, numeral 7 of the Constitution to Indigenous communities and nationalities and it refers specifically to the being consulted on projects regarding nonrenewable resources in their territories that may affect them environmentally and culturally. In practice, in the oil and gas industry, this consultation has been required and performed whenever a new oilfield bidding round is offered—except for those oilfields that have been in exploration before 2008 when this obligation was originally enforceable.

The Constitutional Court has recently ruled about this consultation in two separate cases: Nº 22-18-IN and N° 273-19-JP/22. These cases have set the principle characteristics and standards of the consultation as explained below, in lieu of a specific law.

(1) The consultation shall be executed and required prior to any government decision or authorization that may affect the environment.

(2) The consultant shall be the Ministry of Environment.

(3) Instructed the legislative power to issue a law regulation this process.

(4) Consultation is required whenever an indigenous community may be directly or indirectly affected. The Court ruled that the border of concessions or oilfield does not preclude for a community to be affected and; thus, a consultation shall be in place.

(5) To determine if an activity affects directly or indirectly and indigenous community, the government shall take into consideration the opinion of such community.

In the peace negotiations between the government and the Indigenous communities that occurred in June 2022 to stop riots that were initiated weeks earlier, a moratorium on awarding mining and hydrocarbons concessions was agreed to until an Indigenous Consultation Law is enacted. Such bill was supposed to be drafted by both parties, but it did not occur. Currently there are two bills, one from an Indigenous political party an another one drafted by the government awaiting process in a legislature that is currently closed until the elections that will be held in August 2023.

Environmental Consultation

Environmental consultation is not a right of the Indigenous people or communities as the prior two consultations were analyzed; but rather a right of all citizens to be consulted when a decision may affect the environment. It is provided in article 398 of the Constitution of Ecuador and derived from an InterAmerican law called Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean - Escazú Agreement. The Environmental Consultation is an obligation of the Ministry of Environment that shall be complied with before granting an environmental license for a specific project requesting it.

A first try to regulate this consultation was provided in the Environmental Code *(Código Orgánico del Ambiente)* and its regulation *(Reglamento al Código Orgánico del Ambiente)* enacted on April 2017 and May 2019, respectively. On October 11, 2021, the Constitutional Court declared the chapters on environmental consultation unconstitutional as they did not comply with the international standards required.

The Constitutional Court instructed the President to regulate the Environmental Consultation. The Court prescribed that the consultation shall follow, at least, with the following standards: consultation shall (1) be performed on the early stages of the projects; (2) be performed under a reasonable schedule; (3) be adequate to social, economic, cultural, geographical, and gender characteristics of the consultees; and (4) include any element that may be applicable from the consultation to Indigenous communities' procedure.

On May 31, 2023, the President issued a reformed regulation to the environmental code that includes a two-part procedure: (1) informative phase—present the community with the project's information and gather any comments; and (2) consultation phase—democratic debates in which the community shall be consulted if they agree or not with the project and the corresponding granting of the environmental license.

On June 13, 2023, an Indigenous organization challenged the constitutionality of this regulation at the Constitutional Court. While pending ruling, the regulations shall remain enforceable.

# MÉXICO

*Rodrigo Sánchez Mejorada Raab, Reporter*

**Controversial Changes to Mexico's Mining Law Raise Concerns and Legal Challenges**

On May 9, 2023, significant changes were implemented to Mexico's Mining Law (*Mexico: Ley Minera*, now *Ley de Minería*), and to the National Waters Law (Mexico: *Ley de Aguas Nacionales*), Ecological Balance and Environmental Protection Law (Mexico*: Ley General del Equilibrio Ecológico y la Protección al Ambiente*), and the General Law for the Prevention and Integral Management of Waste (Mexico: *Ley General para la Prevención y Gestión Integral de los Residuos)* concerning mining and water concessions. These changes signal a dramatic shift in the Mexican government's stance from being an open, mining-friendly jurisdiction, toward a jurisdiction with mining policies that are based on "resource nationalism," as can be surmised from the legislative bill´s statement of reasons. (The statement of reasons pertained to an almost identical bill presented by the President, which for procedural reasons was replaced by the one that was approved by Congress.) President Andres Manuel López Obrador (AMLO) has been clear about his government's intention to exercise greater control and state supervision over mining activities in Mexico since the beginning of his presidency. He has manifested his intentions throughout his term with actions such as not granting any mining concessions during his tenure and implementing previous amendments to the Mining Law that put lithium resources under government control.

It is important to understand the legislative process of the amendments, since it will in all likelihood have an impact in determining the legality of the changes. On March 24, 2023, AMLO presented a bill to the House of Representatives (*Cámara de Diputados*) to reform and supplement various provisions in the Mining Law and related laws mentioned above. After weeks of infighting among members of AMLO´s party, Morena (who have control of the House of Representatives and the Senate), and lobbying by representatives of the Mining Industry, the Morena representatives introduced a new bill that was perceived to be a "softer" version of AMLO´s bill, but in essence was the same. At this time there were other 17 other pieces of legislation with sweeping changes in other industries that were awaiting discussion and approval by Congress. After a closed-door meeting between AMLO and Morena representatives and senators, the 18 bills, including the Morena bill with the changes to the Mining Law, were passed by the House of Representatives and the Senate in a frenzied rush on late Friday and early Saturday sessions, in an alternate chamber without the opposition present, since the opposition occupied the Senate's normal headquarters to protest a lack of debate of the bills.

The changes to the Mining Law brought a cascade of constitutional challenges (*Amparos*) against the bill from mining companies, and also what is called an Unconstitutionality Action filed in the Supreme Court by opposition members of the House of Representatives, based on the irregularities in the legislative process to approve the 18 pieces of legislation, including the changes to the Mining Law. Several courts have granted temporary protection to Mining Companies against the changes under the Amparos, it is uncertain if the Unconstitutionality Action will be resolved before the Amparos filed by mining companies.

It is important to note that a few months ago, similar changes to Mexican electoral laws were passed under similar rushed circumstances. The opposition also filed an Unconstitutionality Action against the relevant bills, which led 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, effectively nullifying the approved bills. If that is the case, the Amparos will be declared without subject matter and be dismissed.

Since the possible future decision of the Supreme Court to invalidate the amendments to the Mining Law would be based on legislative procedural grounds, it would be possible for the amendments to be reintroduced in Congress during the next legislative period starting on September 1 (or during an earlier extraordinary period called for the specific purpose of discussing the amendments). There would, however, be more room for discussion with the authorities regarding the amendments, and the political times will have changed as a result of the impending 2024 elections. Therefore, the future of the changes to the Mining Law at the time this article is published is uncertain.

Here is a summary of the main changes to the impacted laws regarding mining and water concessions:

Mining Law

- The name of the Law is changed from *Ley Minera* to *Ley de Minería*.
- The preferential nature of the mining activity over other economic activities and land use is eliminated. The exploration, exploitation, and beneficiation of minerals or substances will not justify the expropriation of land in favor of private parties, nor the forceful granting of a temporary occupation order. While the right to request a temporary occupation is maintained, it is meaningless, because proof of surface rights being secured prior to the granting of a temporary occupation order, as well as prior to obtaining a concession, is now a requirement. Oil and electricity activities are still preferred over mining.
- The mechanism for granting concessions is modified. The land free for claiming scheme is eliminated, and mining concessions may only be granted by means of public bidding, having previously complied with several conditions, including:
- Free, prior, and informed consultation with indigenous peoples and communities must be carried out by the Government. A consultation procedure is foreseen prior to the granting of mining concessions, recognizing the right to the preferential use and enjoyment of the natural resources of the places inhabited and occupied by the communities.
- Environmental impact authorization for the project is now required prior to obtaining the mining concession, to be carried out simultaneously.
- A new social impact study must be submitted by the winners of a bidding procedure to determine the probable effects that the mining activity could have on the daily life of the people and to establish real prevention, mitigation, and compensation measures, effectively guaranteed by a letter of credit or similar guarantee.
- Preferential right for adjoining concession holders is created. In case there is a public bidding process for a lot next to a mining lot currently covered by a mining concession, the corresponding concessions holder has a preferential right over the new concession if it offers the same consideration as the highest bidder.

- The number of adjoining concessions under one concession holder is limited. No new concessions will be granted to concession holders that have two or more concessions which lots are adjacent to the new mining lot.
- The transfer of mining concessions is regulated. Private law acts will not be recognized for the transfer of mining concession. The Ministry of Economy may authorize the transfer of a mining concession only when the requirements requested for granting the original concession are met.
- The use of mining concessions as collateral is limited. Mining concessions can be used to guarantee obligations of its concession holders subject to the mine being in operation and (1) prior stipulation from the creditor to the Ministry of the Economy that it is aware of the restrictions mentioned in the Law; and (2) prior authorization from the Ministry of the Economy. If the collateral is seized, the secured creditor must transfer the concession within six months to a third party who satisfies the new transfer restrictions mentioned above. Alternatively, the creditor may provide evidence that it meets all the requirements to become a concessionaire under the new rules and seize the concessions. It is unclear how these provisions will work with current legal processes to collect on collateral.
- Mining concessions will be individualized for individual minerals or substances. The law returns to the previous regime where a mining concession does not cover all the minerals found in the mining lot. If other minerals are found during the exploitation that are not included in the concession, the concession can be modified to include them through payment of a discovery fee plus what we understand means a production royalty to be determined. Alternatively, minerals not covered by the concessions should be delivered to the Ministry of the Economy.
- New requirements to be a concession holder. To obtain a mining concession, applicants are required to demonstrate technical, legal, economic, and administrative capacity.
- New profit-sharing obligation for communities is created. New concessions will have the obligation to pay 5% on taxable profits (deducting non-deductible taxes from the basis current language is unclear as to exactly what this means) to any type of settlement that is located in the area covered by the new concession.
- The duration and extension of mining concessions is reduced. The term of the concession is reduced from 50 to 30 years, extendable for one single occasion for a period of 25 years, subject to being current with its obligations. The first 5 years of the concession can be used for pre-operation activities. After the concession extension lapses, the former concession holder has a preferential right over the mining lot if it is offered again in a public bidding if it equals the highest bidder, in which case the term of the new concession will be for 25 years, not extendable.
- The Mexican Geological Service is in charge of mineral exploration. If a company or individual has information of possible mineral deposits within an area not already covered by a mining concession, they must inform the Ministry of the Economy of such situation, so that the Mexican Geological Service can explore the area for mineral deposits. The Geological Service can enter into a collaboration agreement with the interested party in order for the latter to carry out the exploration in a maximum term of five years. Should mineral deposits be discovered, and the area subsequently become subject to a competitive bidding process for the granting of a concession, the aforementioned interested party will have a preferential right to obtain the concession. If it offers at least 90% of the highest bid submitted during the competitive bidding process.
- The mining concession is conditioned to the availability of water and prohibited in natural protected areas. As indicated below, a new water concession type is created for mining use. No mining concessions can now be granted in natural protected areas, as well as other areas such as the seabed that is part of the Mexican economic exclusive zone.
- The rights of concessionaires regarding water are limited. The right to take advantage of water from mine works is now limited and must be notified to the Water Commission and pay corresponding water rights.
- Water recycling. Water re-utilization measures must be introduced to attain at least 60% recycling of treated residual water. No timeframe is set.
- Mining Reserve Zones can be created. Mining Reserves can be declared when the mining potential of the area justifies public interest, or reserved or strategic minerals are found in the area.
- The way of determining mining lots is changed. The concept of starting point is eliminated, so the determination of the mining lot will be made based on the geographic coordinates of the external vertices, by means of the technical norms issued by INEGI, except when these conditions cannot be fulfilled because they are adjacent to other mining lots. Likewise, the concept of a “gap” between concessions is eliminated, as well as the preferential right over them.
- Access to the Public Registry of Mining is limited. Any consultation must now be made through the electronic means that the Ministry of the Economy establishes for this purpose.
- Process to stop being a concession holder is changed. The figure of dropping a mining concession is eliminated and the concept of early termination is added, which we assume will have additional requirements, stipulated in the Regulations of the Mining Law.
- Obligation to report accidents in the mine site is created. Virtually any accident in a mine must now be reported to the Ministry of the Economy within 72 hours of the accident. Failure to report two consecutive accidents are grounds for the concession to be cancelled.
- New grounds for cancellation of mining concessions are added. (1) failure to pay mining rights for two consecutive years; (2) failure to submit assessment work reports for two consecutive years, or five non-consecutive years; (3) failure to start work in one year; (4) failure to perform work in a period of two consecutive years; (5) failure to submit a mine closure plan; (6) failure to name the engineer in charge of security; (7) failure to allow Ministry personnel to verify obligation in the mine site; (8) failure to have a water con-

cession in force; (9) when the authority determines that there is eminent risk of ecological imbalance, or there has been irreversible harm to the natural resources, pollution, etc.; (10) stop exploitation activities once they´ve started; among others.

- A chapter on crimes is created with the purpose of punishing criminal conduct in mining matters. Penalties can range from severe fines to prison for 5 to 15 years. One of the new crimes added is if workers suffer injuries or harm for failure to comply with safety regulations.
- New administrative fines are created. New fines for administrative sanctions are created (such as fines for non-compliance with the various new reporting obligations). These fines may amount to up to 5% of the company's annual revenue.
- New administrative rules are implemented, such as eliminating automatic approvals in favor of the concessionaire, extending the term to punish violation of the law from 5 to 10 years, establishing that an administrative procedure will be deemed to be abandoned if the interested party takes no action within a six months period, etc.
- The Ministry of the Economy is granted greater authority to oversee and cancel offending Mining Concessions and concessionaires. The causes for cancellation of a mining concession are broadened to include several new reporting obligations.

National Waters Law

- The figure of water concession for specific use in mining is established. The concessions will have a term of 30 years and there are additional requirements to normal water concessions. It can be expanded for another term of 25 years as long as the mining concession is still in-force.
- The amount of water a water concession holder can use can be reduced if there is scarcity of drinking or domestic use water in the area.
- The transfer of water concessions for mining use is prohibited.
- The use of water found in mines is regulated.

General Law of Ecological Equilibrium and Environmental Protection

- No mining activities can be carried out in Natural Protected Areas. This includes buffer zones.
- A Restoration, Closure and Post-Closure Program is established. The purpose of the program is to guarantee compliance with environmental commitments at the time of termination, for any reason, of the mining concession. It establishes restoration actions from the beginning of the exploration, exploitation and beneficiation activities of minerals or substances until the closure and post-closure of the mining project. The closure and post-closure plan must be secured by a letter of credit or similar instrument.

General Law for the Prevention and Integral Management of Waste

- The management of mining and metallurgical waste is integrated as an object of the Law.
- The regulation of waste management is enabled. Powers are granted to federal government authorities to issue regulations, Mexican Official Standards, and other legal provisions to regulate the integral management of mining and metallurgical wastes under their jurisdiction, as well as to sign collaboration agreements with federal entities.
- The final disposal of waste is limited. The final disposal of mining and metallurgical wastes is prohibited in protected natural areas, wetlands, waterways and federal zones of national waters or in places where the path that the waste would follow if broken up would affect population centers.
- Responsibility for waste generated by mining activities is added. The waste generated by the exploration, exploitation, beneficiation or exploitation of a mining concession will be the permanent and non-transferable responsibility of the holder of the mining concession, regardless of whether it is managed through a third party.

Transitional Articles of the Reform

- Existing concessions keep their duration. Existing mining concessions remain unchanged as to their term. While not clearly set forth, we believe they may be extended upon expiration for a period of 25 years, except in the case of concessions in Natural Protected Areas and when mercury is being mined.
- Cancellation of concession applications. Automatically cancel all the applications for concessions currently in process.
- File and guarantee a closure plan. Create the obligation for current concession holders to file the abovementioned Restoration, Closure and Post-Closure Plan and its corresponding guarantee.
- Existing tailings. Create the obligation for current concession holders to guarantee that a current tailings location does not affect settlements, people and the environment. If the authorities deem that settlements, people, or the environment are affected by tailings, concession holders will have 365 days to move or remediate the tailings.
- Change of existing water concessions. Water concession holders that use the water for mining purposes must request the change of the concession to the new mining water concession within 90 days of the amendments coming into force.

# PERÚ

*Oscar Benavides, Reporter*

**Peru—Back on the Road to Stability**

On December 7, 2022, the Peruvian Congress demoted former President Pedro Castillo after his failed attempt coup. Due to Castillo's demotion (who was arrested and is still in prison pending trial), Dina Boluarte, then Vice President, was sworn in as the first woman to be President in Peru.

The removal of Castillo triggered social unrest and violence in some areas of the country, with most protestors demanding the immediate call for new elections (and a small minority calling for the release of Castillo from his arrest). Boluarte initially offered to call for general elections (presidential and parliamentary) in April 2024, but the pressure to advance the elections to

late 2023 lead to the disapproval of Boluarte's proposal by Congress. However, Congress was subsequently unable to reach an agreement for setting a date for elections. As things stand today, Boluarte is expected to complete the term for which Castillo was elected and, therefore, to remain in office until the end July 2026.

Protests ceased in March 2023. Peru has found a relative social and political stability ever since. The latter, added to the fact that Boluarte appointed a professional and technical cabinet (in opposition to ruling party or political operators as Castillo had done), and that her government has evidenced having a positive approach towards private investment, foreign and domestic, has improved the general business environment in the country.

Though cautiously, this new context has made investors recover general confidence in Peru, which had been affected with the election of Castillo as President. For example, in March 2023 First Quantum Minerals (FQM) and Rio Tinto announced a partnership to progress the La Granja Copper Project, one of the largest copper deposits in the world, which was acquired by Rio Tinto in 2006. FQM has committed an initial investment of US$546 million to fund capital and operational costs required to unlock the project.

Furthermore, an estimate of US$6,920 million investment in mining projects is expected during 2023 and 2024. Among them, Corani, Romina, Magistral, and Reposición Antamina, with an expected investment of US$2,947 million in 2023.

The oil and gas market has been active. Perupetro, the State-owned oil company, has recently revealed its interest in exploiting four strategic oil deposits in the north of the country. Perupetro also announced that it will be seeking to implement strategic partnerships with private companies to exploit these deposits.

Peru's recently found social and political stability has helped investors gain trust in the country. Maintain and improve current conditions will help the country continue attracting investment in both mining and oil and gas projects, which huge potential (especially in mining) is globally acknowledged.

*Luis Felipe Huertas del Pino, Reporter*

**Peruvian Constitutional Court Demands Changes in Procedures for Obtaining Mining Concessions**

The Peasant Community of Asacasi, located in the Apurimac Region in the southern highlands of Peru, sued, among other authorities, the Peruvian Ministry of Energy and Mines and the Regional Directorate of Energy and Mines of Apurimac for the systematic failure to carry out free, prior, and informed consultations before issuing mining concessions in the geographical area that is part of the Community's territory. The Community alleged that it is a Quechua Indigenous people, whose rights to prior consultation, communal property and territory, and self-determination, as well as other rights contained in Convention 169 of the International Labor Organization and recognized in international human rights instruments, which are constitutionally protected, have been violated.

As part of this lawsuit, the Community requested that more than 20 mining concessions granted on its territory be declared null and void and that the defendant authorities be ordered to carry out a process of prior, free, and informed consultation with the members of the Community in order to obtain their consent for the eventual reissuance of the mining concessions whose nullity was requested. Finally, the Community requested the non-application of the norms that regulate the notification of mining concessions through the Official Gazette. Publication in the Official Gazette is a requirement of the procedure for granting mining concessions, through which the general public (including Indigenous communities) is informed of the existence of these applications. The regulation establishes that any person who feels affected by the granting of the requested concession may file an opposition to the process within 30 days of the publication of the notice.

On June 28, 2023, the Peruvian Constitutional Tribunal in the last and final instance declared the claim unfounded. *See* Peruvian Constitutional Tribunal Resolution 310/2023 (Exp. N° 03326-2017-PA/TC). The court based its rejection of the claim on the fact that Peruvian laws and regulations contain clear procedures that establish the necessary steps that must be followed for a mining concession to be applied for and approved, including the ways in which such applications must be publicized to the general public during the corresponding procedure. Nevertheless, the court considered that there is a legal and regulatory omission in the way mining concession applications are publicized that could potentially affect the constitutional rights of Indigenous and aboriginal peoples and it is appropriate that such rules and regulations be amended.

Thus, the court's resolution urges the Congress of the Republic, in accordance with its functions, to regulate the scope of the right to citizen participation of Indigenous or native peoples with regard to the publication of mining concession applications and the granting of mining concessions. Likewise, it urges certain authorities of the Executive Power so that, within the framework of their competences and attributions, they coordinate the regulation referred to guarantee the culturally appropriate publication of mining concessions that affect the territory of the Indigenous peoples.

With this judgment, although the court has upheld the laws and regulations that so far define the manner in which mining concession applications are processed and publicized, it has clearly stated that the publication of the application in the Official Gazette and the 30-calendar day period for the filing of oppositions do not constitute "culturally adequate" ways of publicizing such applications. It is now up to the Congress of the Republic and the Executive Power to determine what are culturally appropriate ways of advertising the applications and to adopt one that, in compliance with the court's ruling, allows applicants for mining concessions an efficient procedure.

Unfortunately, the Constitutional Court's ruling does not shed much light on what constitutes culturally appropriate ways of publicizing information to Indigenous communities. The members of these communities generally live in remote rural areas that are difficult to access due to the inadequate state of communication routes outside of large cities. At the same time, media and internet coverage in these areas is low, which hinders their integration.

One of the virtues of the current system is that for anyone applying for a mining concession to make a publication in the Official Gazette and wait 30 days is a simple matter. Finding an alternative mechanism that is both simple and ensures a culturally appropriate formula for publicizing the application, considering the major infrastructure limitations that affect rural Peru, will undoubtedly be a major challenge.

Political instability that is currently complicating several Latin American countries is not alien to Peru. On the other hand, countries in competing jurisdictions have improved their profile as recipients of mining investment. Peruvian authorities should

be aware that the country's great geological attractiveness is not enough to attract mining investment. If Peru does not make its regulatory framework more attractive to consolidate these investments, they will simply continue to go to other jurisdictions. With the Tribunal's ruling, the task has become more difficult.

## VENEZUELA

*Santiago Fontiveros & Isabella Sordo, Reporters*

**How Do Gas Supply Agreements Work in Venezuela?**

Gas Supply Agreements (GSAs) play a vital role in facilitating the flow of natural gas from producers to consumers, ensuring a stable and reliable energy supply. In Venezuela, a country with proved gas reserves of 221.1 trillion cubic feet (according to the BP Statistical Review of World Energy June 2022), understanding how GSAs are regulated is of paramount importance due to its potential involvement in the global energy landscape. This report aims to explore the dynamics of GSAs in Venezuela, especially for private players, shedding light on the key elements, contractual provisions, and the regulatory framework that governs these agreements.

GSAs establish the terms and conditions under which natural gas is traded and supplied between producers, gas transmission companies ("Transporters"), and buyers. Understanding the functioning of GSAs in Venezuela requires an examination of several aspects. However, in this article we will analyze the legal and regulatory framework that governs the natural gas sector and provides the foundation for GSAs, especially for private entities.

Legal Framework

When it comes to Natural Gas, the *Ley Orgánica de Hidrocarburos Gaseosos* (1999) – Natural Gas Master Law (NGML) stands as the principal legislation governing the natural gas industry in Venezuela. According to its article 2, the activities of exploration and exploitation of non-associated gas deposits, as well as the collection, storage, utilization, processing, industrialization, transportation, distribution, and domestic and international trade of natural gas (non-associated gas and gas produced in association with oil or other fossil fuels), are governed by said Law.

In addition, it is important to point out that, under the scope of the NGML, all the activities under the gas supply chain in Venezuela can be 100% executed by a national or foreign private company by obtaining a license, in case of exploration and exploitation activities, or a permit, for the rest of the activities. Consequently, as opposed to what happens with liquid hydrocarbons, all the parties involved in a GSA (gas producers, Transporters, and buyers) may be private entities or state-owned companies.

*Natural Gas Master Law*

The NGML does not regulate GSAs extensively. The only explicit reference to a GSA can be found in article 29:

> Producers of gaseous hydrocarbons . . . may enter into contracts to supply them to those who have obtained the permit referred to in Article 27.
>
> When gas producers develop projects to use the gas produced by them, they must be subject to the permits and other provisions from this Law.

Said permit refers to an authorization given by the Venezuelan Ministry of Oil to carry out activities other than exploration and exploitation. Therefore, any company that obtains such permit for processing, industrialization, transportation, distribution, or trade of natural gas can enter into a GSA with any gas producer in Venezuela.

The transcribed article also implies that gas producers (licensees) cannot execute GSAs with parties that do not have the corresponding permit. For producers to sell gas to final consumers they must secure a permit to trade.

Overall, the NGML offers flexibility regarding the terms and conditions to include in a GSA, the parties can negotiate and agree to the terms at its own discretion, including how to structure the agreement and whether to include a Transporter as a party, or to sign a separate gas transmission agreement. This flexibility may be beneficial for the parties since there is no standard GSA, and the wording of each contract must be agreed for each specific case.

*NGML Special Regulation*

The NGML Special Regulation, *Reglamento de la Ley Orgánica de Hidrocarburos Gaseosos* (2000), recognizes the existence of GSAs as "contracts between the producer and major consumers, distributors or traders to supply them with gas," also providing flexibility regarding the specific terms to be agreed by the parties. However, it is a bit more extensive when it comes to gas transmission agreements.

First, this regulation limits the participation of the Transporter. Article 53 establishes that Transporters can only purchase gas if it is going to be used as fuel for its operations, or to balance transmission systems. This means that companies that obtain the permit from the Ministry of Oil for gas transportation cannot purchase gas to transport it or transport it to sell it. GSAs shall always be between producers and distributors or buyers (including processors, major industry consumers, and traders). Transporters can be part of a GSA, or the buyer or the seller (as the case may be) can enter into a gas transmission agreement with Transporters to take the gas to the required location.

Lastly, the NGML Special Regulation, pursuant to its article 59, limits Transporters' contractual liability towards the user or consumer of the tranche between the receiving point and the delivery point.

*Licenses (Not Applicable When the Producer Is the State, or a Company Wholly Owned by the State)*

As mentioned before, to produce non-associated gas in Venezuela companies need to secure a license from the Ministry of Oil. Producers must comply with the terms and conditions of their license, which can vary on a case-by-case basis. Considering this, it is important to take into consideration those terms and conditions when planning to enter into a GSA with a producer.

There are some licenses that limit the possibility for producers to sell the gas to a buyer selected by them at its own discretion. Depending on the specific terms and conditions set on each license, producers may execute GSAs with different buyers.

Key Clauses and Legal Related Risks

Even though there is no standard GSA, there are some commonly used clauses. Among those, the most relevant clauses are take-or-pay, deliver-or-pay, adjustment of quantity or quality, force majeure, and pricing.

From all those clauses there are two of them that could be affected by the Venezuelan legal framework: (1) adjustment of quality and (2) pricing.

Regarding adjustment of quality, specifications for natural gas transmitted in Venezuela are set by the Ministry of Oil, and no GSA can include lower quality specifications.

The most efficient alternative to mitigate this risk is to include the quality specifications established by the Ministry of Oil as the minimum quality specifications acceptable within the GSA, particularly considering that there is no gas transmission system other than the National Pipeline Network, owned by the Venezuelan state.

Also, as article 12 of the NGML states, the Ministry of Oil has the power to determine the prices for the natural gas from production at processing centers in accordance with the equity principle. This provision could clearly affect pricing clauses to be included in local GSAs.

In essence, producers and buyers can agree on a price or a pricing formula within a GSA, but there is a risk the Ministry of Oil could exercise its power and determine the price.

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