



ICLG

The International Comparative Legal Guide to:

Mining Law 2014

1st Edition

A practical cross-border insight into mining law

Published by Global Legal Group, with contributions from:

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URL: www.glgroup.co.uk

GLG Cover Design

F&F Studio Design

GLG Cover Image Source

iStockphoto

Printed by

Ashford Colour Press Ltd.
August 2013

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ISBN 978-1-908070-70-8

ISSN 2052-5427

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EDITORIAL

Welcome to the first edition of *The International Comparative Legal Guide to: Mining Law*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of mining laws and regulations.

It is divided into two main sections:

Three general chapters. These are designed to provide readers with a comprehensive overview of key mining issues, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in mining laws and regulations in 37 jurisdictions.

All chapters are written by leading mining lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor, Christopher Ian Stevens of Werksmans Attorneys, for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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1 Relevant Authorities and Legislation

1.1 What regulates mining law?

Mining in Ecuador is principally governed by the Mining Act (“MA”), issued on January 29, 2009 and the General Regulation of the Mining Act (“GRMA”), issued on November 16, 2009, which regulates activity as a whole. The MA and GRMA recognise, regulate and classify mining activities depending on production levels, namely: large-scale mining; medium-scale mining; small-scale mining; and artisanal mining.

There are also specific regulations on security in mines, small-scale and artisanal mining, environmental issues, and also on the mining of certain specific minerals, among others.

1.2 Which Government body/ies administer the mining industry?

The mining industry is administered principally by the Ministry of Energy and Mining (“Ministry”) and the Mining Regulation and Control Agency (“Arcom” for its acronym in Spanish). Also involved in the mining industry are the National Institute of Geological, Mining and Metallurgical Research, the National Mining Company, and the Municipalities to a certain extent.

The Ministry has a duty of general oversight of mining activity in the country and, most notably, it is the entity that grants, administers, and extinguishes all mining rights. The Arcom is the specialised technical organism in charge of, among other things, supervising all the phases of mining activity.

1.3 Describe any other sources of law affecting the mining industry.

Because concession agreements are public contracts, they are subject to the general rules of procurement law. Also, tort liabilities are subject to environmental and other administrative regulations, as well as to the general law of torts laid down in the Civil Code.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

Pursuant to the MA, in Ecuador, there is a general freedom of reconnaissance, which means that any person or entity, domestic or foreign, may conduct reconnaissance activity in search of mineral

deposits within the territory of the Republic, except in protected areas or areas within the limits of a mining concession, urban areas, populated areas, archeological areas, areas considered of public utility, and Special Mining Areas.

2.2 What rights are required to conduct exploration?

In order to conduct exploration works, it is necessary to previously obtain a mining concession.

The mining concession is an administrative act that grants a mining title to a person who has the exclusive right to prospect, explore, exploit, beneficiate, smelt, refine, market and sell all existing minerals obtained within a particular area. Once issued, the mining title must be registered in the respective mining registry managed by the Arcom. The term of a mining concession is 25 years, renewable for similar periods upon the request of the concession holder.

Once the mining concession is granted, exploration may be conducted for a four-year term, identified as initial exploration. The holder of the concession may request an extension of an additional four-year term to conduct advanced exploration. This extension may be granted by the Ministry if the holder of the concession has complied with the minimum investment requirements and waives its concession rights over a part of the total area of the concession.

2.3 What rights are required to conduct mining?

Once the initial or advanced exploration term expires, the holder of the concession will have a two-year term to make the economic evaluations of the mineral deposits and request authorisation from the Ministry to begin the exploitation (i.e. mining) phase. If the request is accepted by the Ministry, an administrative resolution is issued declaring the initiation of the exploitation phase.

In the next six months after the issuance of the resolution, the holder of the concession must execute the Mining Exploitation Contract, establishing the terms and conditions for the construction, mounting, extraction, beneficiation, transportation and commercialisation of the minerals obtained within the area of the mining concession.

2.4 Are different procedures applicable to different minerals?

All metallic minerals are subject to the procedures outlined above, but there are different rules for non-metallic minerals. In the case of non-metallic minerals that are not for construction purposes, the GRMA establishes an authorisation procedure. In the case of non-

metallic construction materials, the local municipal Governments have the authority to grant concessions, and the procedures to obtain them are enacted by the respective municipal Governments.

2.5 Are different procedures applicable to natural oil and gas?

Yes. The procedures detailed above do not apply to natural oil and gas. The applicable procedures to natural oil and gas are set forth in the provisions of the Hydrocarbons Law and its regulations.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 Are there special rules for foreign applicants?

In general, for large-scale mining there are no special rules for foreign applicants, who are permitted to hold concession rights as long as they are domiciled in Ecuador. It is prohibited to grant mining rights to national or foreign individuals or corporations with partners or shareholders domiciled or incorporated in tax havens.

Pursuant to the MA, foreigners and corporations with foreign partners or shareholders are expressly prohibited from pursuing small-scale and artisanal mining.

3.2 Are there any change of control restrictions applicable?

Pursuant to the GRMA, the same Ministry authorisation required for the transfer of rights over a mining concession must be obtained in the case of a direct or indirect transfer of a controlling stake in a company that holds a mining concession.

Additionally, the MA establishes the duty to notify the Ministry and to register before the mining registry managed by the Arcom, any direct or indirect transfer of more than 10 per cent of the shares or participation of a holder of a mining concession. This includes transactions that occur on domestic or international stock exchanges.

3.3 Are there requirements for ownership by indigenous persons or entities?

The mining legislation does not establish requirements for ownership by indigenous entities or persons. However, both the Constitution and the MA establish the obligation to consult indigenous communities with regard to the exploration and exploitation of minerals in their territories when such activities may affect their interests.

3.4 Does the State have free carry rights or options to acquire shareholdings?

No. The State does not have free carry rights or options to acquire shareholdings in mining projects. However, the President of the Republic may designate certain zones that are not within an already existing concession as Special Mining Areas, for purposes of geological research or other scientific activities.

3.5 Are there restrictions on the nature of a legal entity holding rights?

There are no restrictions on the nature of a legal entity holding rights. All persons and entities, domestic or foreign, public, private

or mixed, communal or self-managed, may be holders of mining rights, pursuant to the MA and the GRMA.

4 Processing and Beneficiation

4.1 Are there special regulatory provisions relating to processing and further beneficiation of mined minerals?

The MA states that the Ministry shall authorise the installation and operation of beneficiation, smelting or metallurgical plants at the request of any person or entity. The person requesting the installation and operation of such plants does not need to hold a mining concession, and once the authorisation is granted it must be registered before the corresponding mining registry managed by the Arcom.

4.2 Are there restrictions on the export of minerals?

In general, the holders of mining concessions are able to export their minerals without any restriction. For the specific case of gold obtained through artisanal mining, the Central Bank of Ecuador is in charge of its commercialisation directly or indirectly through other financial entities duly authorised by it.

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

In general there are no restrictions on the transfer of rights to conduct reconnaissance, exploration and mining. However, certain requirements must be met in order to legally transfer a mining concession.

Prior to the transfer of a mining concession, authorisation from the Ministry is required. In order to issue this authorisation, the Ministry must determine the suitability of the transferee after consideration of reports issued by the Arcom and the environmental authorities regarding the transfer.

Once authorisation is obtained, the parties may execute the transfer contract and then register it with the mining registry managed by the Arcom.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged to raise finance?

Pursuant to the MA, mining titles (which include the mining rights) may be subject to pledges, assignment in guarantee and other guarantees set forth in the law. The MA also allows the creation of pledges over all the equipment and machinery used for the operation of a mining concession as well as the minerals obtained from the deposit.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

Rights to conduct reconnaissance, exploration and mining are capable of being territorially subdivided. Pursuant to the MA, the

mining title is subject to division or accumulation, within a minimum limit of 1 mining hectare and a maximum of 5,000 mining hectares per concession.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

Yes. Rights to conduct reconnaissance, exploration, and mining are capable of being held in undivided shares.

6.3 Is the holder of a primary mineral entitled to explore or mine for secondary minerals?

The mining concession allows the holder to explore and mine for all minerals found within the concession area. Neither the MA nor the GRMA create an obligation on a holder to explore or mine for secondary minerals. Likewise, no restrictions are imposed on the concession holder's right to mine for secondary minerals.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

In general, yes. The rights of the holder of a mining concession extend over residue deposits located within the concession area.

6.5 Are there any special rules relating to offshore exploration and mining?

The utilisation of minerals located offshore is reserved for the National Institute of Geological, Mining and Metallurgical Research and the National Mining Company, who may execute research and mining services contracts with domestic or foreign corporations pursuant to the specific regulations applicable to offshore mining.

7 Rights to Use Surface of Land

7.1 What are the rights of the holder of a right to conduct reconnaissance, exploration or mining to use the surface of land?

Pursuant to the MA, the holder of a mining concession has an easement over the surface land in order to duly exercise its mining rights. The rights emanating from this easement include, among others, the right to occupy certain areas for constructions required for mining activities, as well as rights related to waterways, railways, landing strips, ramps, transport belts and electrical installations. The easement must be registered in the mining registry managed by the Arcom.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have *vis-à-vis* the landowner or lawful occupier?

The owner of the surface land is entitled to receive payment from the holder of the mining concession for the easement granted. In certain cases, the easement rights, including terms and conditions, are expressly agreed to in contracts executed between the holder of the concession and the owner of the surface land. If no agreement is reached, the Arcom may order the creation of the easement and determine the mandatory payments due to the owner of the land.

7.3 What rights of expropriation exist?

The holder of the concession has no rights of expropriation over the land.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

The holder of mining concessions prior to initiating mining activities must obtain and submit environmental studies to prevent, mitigate, control and repair the environmental and social impact resulting from such activities. These studies along with an environmental licence must be approved and granted by the Ministry of the Environment, respectively.

Additionally, the holder of the concession has the obligation to submit one year after the issuance of the environmental licence an environmental compliance audit that allows environmental authorities to supervise and confirm the plans of environmental management. After the first year, the environmental compliance audits shall be submitted every two years.

8.2 What provisions need to be made for the closure of mines?

The environmental studies and reports made by the holders of the mining concessions must include a description of the plans necessary for the closure of the mines and the reparation and remediation of any environmental harm caused.

Additionally, two years prior to the ceasing of all mining operations, the holder of the mining concession must submit, for the approval of the Ministry of the Environment, an Operations Closure Plan, detailing reparation and remediation measures and a process to verify their compliance, social impacts caused and a compensation plan, as well as the guarantees required by environmental regulations.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

The holder of a mining concession must comply with the obligations established in the Operations Closure Plan, which includes in certain cases, among others, measures to avoid water contamination, measures to provide for reforestation, measures to avoid land contamination, measures to conserve flora and fauna, disposal management, measures to conserve the ecosystem, etc.

8.4 Are there any zoning requirements applicable?

No. There are no zoning requirements applicable.

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

The MA requires a compulsory consultation procedure in cases where the mining concession area is located within the territory of an indigenous community.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

The health and safety issues related to mining are treated in the Regulation of Mining Safety. For all other issues, the general health and safety laws and regulations apply.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

The holder of the concession must provide permanent health services to its employees at all times. The initiation of mining activities is subject to the approval of the regional mining authority of the facilities and health and safety precautions established.

11 Administrative Aspects

11.1 Is there a central titles registration office?

Yes. There is a mining registry administered and managed by Arcom. All mining titles and acts related to such titles (such as transfers, pledges, guarantees, easements, etc.) must be registered in the respective mining registry where the mining concession is located in order to have legal effect.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

All decisions taken by the regional mining authorities are subject to administrative review by the Arcom. All administrative decisions may be appealed, as a matter of law, before the courts.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

Yes. Mining in Ecuador is regulated under the framework of the Constitution of the Republic, which came into effect in October 2008. It establishes the State's "inalienable, inherent, and perpetual" ownership of all non-renewable natural resources and designates them a "strategic sector" of the economy. The Constitution also mandates that the participation of the State in the economic benefits derived from the exploitation of the minerals cannot be lower than the amount received by whoever performs the exploitation.

12.2 Are there any State investment treaties which are applicable?

Ecuador has executed various mining cooperation agreements with countries in the region. It has also executed treaties to avoid double taxation with several other countries. Although Ecuador executed in the past a number of bilateral investment protection treaties ("BITs") with other countries (such as the U.S., Canada, Switzerland, Chile and Spain), the Government is in the process of denouncing all of them. Ecuador has also denounced the ICSID Convention.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

Mining companies are subject to the Windfall Tax (Extraordinary Income), equivalent to 70 per cent of the gross amounts obtained from the sale of the minerals at a higher price than the base price established in the Mining Exploitation Contract.

For purposes of Windfall Tax payments, the law considers extraordinary income only such perceived after all pre-operational investments for the preparation and development of the mining concession have been fully recovered.

Also, the holder of the concession is subject to other taxes, payments and contributions, such as income tax (at a rate of 22 per cent of the profits obtained), 15 per cent of labour profit sharing tax (out of which 12 per cent goes to the State and 3 per cent to the employees in the case of large-scale mining; and, 10 per cent goes to the State and 5 per cent to the employee in the case of medium-scale and small-scale mining), and the value-added tax (at a rate of 12 per cent), mining maintenance patent; municipal taxes and contributions and social security contributions.

13.2 Are there royalties payable to the State over and above any taxes?

Yes. In addition to the taxes outlined above, the holder of the concession must pay to the State a royalty of no less than 5 per cent of the value of all sales and no more than 8 per cent for the specific case of gold, silver and copper.

For medium-scale mining and small-scale mining, the royalty is 4 per cent and 3 per cent of the value of all sales, respectively, while artisanal mining is not subject to royalties.

Acknowledgment

The authors would like to thank Pedro José Izquierdo for his invaluable assistance in the preparation of this chapter.



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