

Ecuador

Cesar Zumarraga and Juan Fernando Larrea

Tobar ZVS Spingarn

Mining industry

1 What is the nature and importance of the mining industry in your country?

The quality and quantity of Ecuadorian mineral resources is very similar to that of its neighbours, such as Chile and Peru, who have managed to develop their mining potential. However, less than 4 per cent of Ecuadorian territory has been explored. In fact, according to the *Financial Times*, Ecuador has some of the most attractive gold, silver and copper deposits in Latin America, nevertheless, production has been almost non-existent. There are many reasons for the delay in developing this industry, but if we have to choose the main reason, we would point to erred public policy regarding the mining industry and the absence of legal security, due to legislation largely inspired by the oil industry.

2 What are the target minerals?

The principal minerals targeted in Ecuador are gold, silver, copper, lithium, rare earth, potash, iron, uranium and coal. Ecuador has a much wider geological potential but, to an extent, the minerals targeted depends on global trends and the interest of individual companies.

3 Which regions are most active?

The most important gold and copper deposits discovered to date are located in the south-east of Ecuador, principally in Zamora Chinchipe, Morona Santiago, Azuay and El Oro provinces. It should also be mentioned that there are non-metallic mineral deposits in the south of the country and in particular in the province of Azuay.

Legal and regulatory structure

4 Is the legal system civil or common law-based?

The legal system is civil law-based.

5 How is the mining industry regulated?

According to the 2008 Constitution, the state owns all minerals and non-renewable natural resources within the national territory. These minerals and resources are considered to form a strategic sector, which is managed, regulated, controlled and governed by the state. The state can, on an exceptional basis, delegate mining rights to individuals or entities, by granting mining concessions for a term of 25 years. The concessionaire will have the exclusive right to explore, exploit, process and sell any metallic minerals within the concession. When a project is considered in the range of large-scale mining, prior to the commencement of the exploitation phase, the concessionaire must first sign an exploitation contract with the Ecuadorean state. This contract is not needed when a project is in the range of artisanal, small- or medium-scale mining.

The Mining Act defines artisanal mining as that which is carried out for the subsistence of family units through the use of manual equipment or portable devices.

The daily production ranges for artisanal mining are:

- for metallic minerals: up to 10 tonnes in underground mining and up to 120 cubic metres in alluvial mining;
- for non-metallic minerals: up to 50 tonnes; and
- for construction materials: up to 100 cubic metres in alluvial deposits and 50 tonnes for hard rock open-pit mining.

The daily production ranges for small-scale mining are:

- for metallic minerals: up to 300 tonnes in underground mining, up to 1,000 tonnes in open-pit mining and up to 1,500 cubic metres in alluvial mining;
- for non-metallic minerals: up to 1,000 tonnes; and
- for construction materials: up to 800 cubic metres for alluvial terrace mining and up to 500 tonnes for open-pit mining.

The daily production ranges for medium-scale mining are as follows:

- for metallic minerals: 301-1,000 tonnes in underground mining, 1,001-2,000 tonnes in open-pit mining and 1,501-3,000 cubic meters in alluvial mining;
- for non-metallic minerals: 1,001-3,000 tonnes; and
- for construction materials: 801-2,000 cubic metres for alluvial terrace mining and 501-1,000 tonnes for hard rock open-pit mining (quarries).

Any range that exceeds those established for medium-scale mining is considered large-scale mining.

By way of amendments to the Mining Law introduced on 16 July 2013, the process for obtaining environmental permits was simplified (see question 34).

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

Generally, there are a number of legal provisions regarding the mining industry in the 2008 Constitution and, in particular, there is the Mining Act that was enacted on 29 January 2009, further modified by the amendment passed on 16 July 2013. The General Mining Regulations and the Small-Scale and Artisanal Mining Regulations were promulgated on 4 November 2009. A new Mining Environmental Regulation for Mining Activities was promulgated on 27 March 2014.

The principal regulatory bodies that regulate and control the industry are the Mining Ministry, created in February 2015, which replaced the former Ministry of Non-Renewable Resources (MNRNR). The other relevant bodies include the Ministry of the Environment, the Mining Regulation and Control Agency (ARCOM) and the National Geological Mining Investigation Institute. In addition, with the Mining Act, the national mining company (ENAMI-EP) was also created, which is responsible for developing state mining projects and various projects in association with private companies.

There is no doubt that in recent months the government of Ecuador has redoubled its efforts to recover lost time and draft a more appropriate legal framework in order to attract investments in the mining sector.

We believe that these changes have been accelerated with the creation of the Mining Ministry in February 2015, which further indicates the importance this industry has for the government – the work done by the new Mining Ministry has certainly been significant and positive.

In October of 2014, the government incorporated a few regulations to mitigate the impact of the 'sovereign adjustment', which is the application of the constitutional precept set forth in article 408 of the 2008 Constitution. It declares that the state will participate in the benefit of the exploitation of natural resources for an amount no less than that earned by the company that exploits them, and will also charge a windfall profit tax. Formulas were included to calculate the sovereign adjustment, as well as to

determine the base price of metal to which any windfall profit taxes would be applied. Now, both the sovereign adjustment and the windfall profit tax are applied after recovering the investments 'from a financial perspective', in other words, after investments have been recovered, in addition to adjustments for inflation and opportunity costs.

Likewise, in December 2014, the government published an amendment to the law, paving the way for fiscal stability agreements for large- and medium-scale mining projects, with an income tax rate of 22 per cent and the possibility to further extend fiscal stability to include 'ISD', the 5% currency outflow tax, and VAT (currently 14 per cent).

On 17 November 2015, by way of Executive Decree No. 823, several amendments were made to the General Regulation of the Mining Law, which include interesting and positive standards for the mining industry. We would especially like to highlight the regulation for medium-scale mining regimes which, although it was included in the 2013 reform to the Mining Law, had confusing wording and gave the impression that said regime was only applicable to small-scale mining companies and not to companies operating under the large-scale mining regime. With the new regulatory standards, any mining concession, whether it be large- or small-scale, may be applicable to the medium-scale mining regime at any time, whether for technical or even market reasons. Under this regime, exploration and exploitation work may be done simultaneously without the need for companies to be concerned with the expiry of the terms indicated in the exploration phases established for large-scale mining, which has caused so much harm to the industry. Finally, a single rate has been established for the medium-scale mining regime, which is equal to the initial exploration rate in the large-scale mining regime. Without a doubt, this rate is more convenient when compared to those established for advanced exploration in large-scale mining regimes.

Following this, on 18 December 2015, the Public and Private Alliances Act (APP) was executed, introducing a series of modifications to various regulatory bodies and, among them, some relevant regulatory changes were made within the mining industry. Mineral exporters are currently unable to recover any paid VAT, unlike other industries in Ecuador. However, the amendments introduced by the APP allow mineral exporters to recover VAT as of 1 January 2018. In spite of the date this new regulation enters into effect, there is no doubt that this benefit will make all small, medium and large mining projects in Ecuador more economically attractive.

Additionally, APP has introduced an amendment, which permits all gold acquisitions by individuals or holders of mining concessions to have a 0 per cent VAT rate, from 1 January 2018.

Lastly, on 1 March 2016, the Mining Ministry issued Ministerial Agreement No. 2016-002, which contains the Guidelines for Granting Metallic Mining Concessions. Undoubtedly, this is very good news for the mining industry, considering that the mining cadastre will re-open after eight years of being closed following the devastating effects of the Mining Mandate, enacted in April 2008. We hope this brings Ecuador back into the mining exploration scene.

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

Ecuador does not yet have a binding legal code for reporting mineral resources and reserves. However, according to Instruction No. 261 issued by the former MNRNR, until the Classification of Mineral Resources and Reserves Regulations are issued, reports presented to the ARCOM by concessionaires must use the format accepted by the Committee for Mineral Reserves International Reporting Standards, which include the standards of the Australian Joint Ore Reserves Committee, the Canadian (CIM) code NI 43-101, the UK Reporting Code and the South African Code for Reporting of Mineral Resources and Mineral Reserves.

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

According to the 2008 Constitution, the state owns all those minerals and non-renewable natural resources that are within the national territory. However, mining concessions can be granted to individuals. The

concessionaire will have the exclusive right to explore, exploit, process and sell any metallic minerals within the concession.

A mining concession is granted for up to 25 years and may be renewed for an equal period. Once the mining concession has been granted, in large-scale mining the concessionaire shall comply with the following phases and terms:

- up to four years of initial exploration;
- up to four years of advanced exploration; and
- up to two years of economic evaluation of the deposit, which can be extended for an additional two-year period.

During the final phase, the concessionaire must apply for the commencement of the exploitation phase of the project.

Within six months of beginning the exploitation phase, the concessionaire, in the large-scale mining category, must sign a mining exploitation contract with the Ecuadorean government, although negotiations may begin during the economic evaluation phase.

As indicated, artisanal, small- and medium-scale mining operations do not need to sign a mining exploitation contract with the Ecuadorean government and are entitled to carry out exploration and exploitation activities simultaneously.

There are, in fact, large areas where the mining rights are held privately. It should be noted, however, that ownership of mining concessions is distinct from ownership of the surface land.

According to the Mining Act, in order to obtain a new mining concession in a free area, applicants must participate in a public bidding process with the new concession being awarded to the successful bidder in accordance with the Guidelines for Granting Metallic Mining Concessions. If a concessionaire wishes to transfer an existing concession to a third party, authorisation from the mining authorities must first be obtained.

ENAMI-EP has a preferential right to access new mining concessions in any free area of the country without participating in a public bidding process.

9 What information and data is publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

ARCOM keeps a register of all the concessions that exist in the country.

According to the Mining Act of Ecuador, all mining concessionaires should submit technical and financial reports of their activities as indicated by the regulations of the mining authorities. Submitting these reports is a legal duty necessary to stay in good standing. The Mining Ministry and ARCOM are the institutions responsible for receiving annual exploration reports, investment plans and production reports from mining concessionaires.

The ARCOM and the National Institute of Metallurgical Mining Investigation are the government agencies responsible for carrying out technical analyses of national geological information and collecting information for the national mining register. This information is public, but not available online.

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

Individuals or companies who are duly qualified as subjects of mining rights may acquire mining concessions, which are granted by the Mining Ministry following a public bidding process. The Mining Act recognises four categories for mining concession rights: artisanal, small-scale, medium-scale and large-scale. Production ranges for each category were noted in question 5.

Existing mining concessions can be transferred, provided that prior authorisation from the mining authorities has been obtained.

- The main obligations of mining rights holders are:
- to pay annual mining conservation patents;
 - to present annual exploration reports and investment plans;
 - to present biannual production reports;
 - to pay mining royalties to the state when in the exploitation phase;

- to obtain an environmental licence prior to commencing activities;
- to obtain administrative authorisations prior to commencing activities;
- to ensure at least 80 per cent of its workforce are Ecuadorean;
- to comply with the environmental management plan;
- to train their personnel; and
- to maintain information regarding their operations, etc.

11 What is the regime for the renewal and transfer of mineral licences?

Prior authorisation by the Mining Ministry is currently required for the transfer of mining concessions.

The concessionaire must pay the government a fixed fee equivalent to twice the current minimum wage (which is set annually by the government and is currently US\$366) paid prior to the completion of the transfer.

As indicated, a mining concession is granted for up to 25 years and may be renewed for an equal period.

12 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

Domestic and foreign parties are equally entitled to acquire mining rights in Ecuador.

13 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

According to Ecuadorean legislation, mining is considered to be of public interest, which means it is in a special category and is granted more protection than other private interests, including land ownership. If a concessionaire suffers any form of disruption as a result of a third party's actions, concessionaires can initiate an administrative relief action with the ARCOM, which can take either direct or indirect preventive measures.

The Mining Act specifically states that, in the event of a dispute arising out of an exploitation contract made between the Ecuadorean state and a mining concessionaire, such a dispute can either be resolved by the local courts or may be submitted to international arbitration. However, the dispute can only be submitted to international arbitration if arbitration provisions are included in the contract. The seat of arbitration is in a Latin American country as required by the 2008 Constitution.

Foreign international awards are enforceable in Ecuador.

14 What surface rights may private parties acquire? How are these rights acquired?

Private parties may acquire any form of surface rights, from ownership of the surface area to leases, usufructs, easements, etc. If a mining concessionaire wishes to acquire an easement over a surface area in order to develop its mining operations, it can either enter into an agreement with the surface owner or request that the ARCOM impose an easement. It should be noted, however, that foreign nationals cannot acquire any surface rights within frontier zones considered to be an area within 20 kilometres of a national border (see question 45).

15 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

According to the Ecuadorean Constitution (article 315), the state may participate in the use and exploitation of natural resources through public enterprises such as the ENAMI-EP or through mixed public-private enterprises in which the state is a majority shareholder. The ENAMI-EP may also participate in partnership or in association with other entities, public or private, in accordance with the legal provisions (see question 21).

16 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

The 2008 Constitution guarantees the right to private property and prohibits any kind of confiscation. The Constitution declares that the expropriation of property – including mining concessions – for reasons of public benefit or social interest may be declared, at a fair value, restitution and payment. There are no specific rules for valuation and compensation in order to determine how much a private individual could receive due to the expropriation of a mining concession.

17 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

In Ecuador, there are various areas that are considered protected because they are protected forests, state patrimony forests or within the National System of Protected Areas.

As a general rule, by constitutional mandate, the extraction of non-renewable resources, including logging, in protected areas is prohibited. However, such resources can be exploited on an exceptional basis if requested by the president of Ecuador and the Ecuadorean national assembly issues a declaration stating that it is in the public interest.

With regard to Protected Forests, mining activities can be carried out once an environmental licence has been obtained.

Duties, royalties and taxes

18 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

As a general provision, the 2008 Constitution provides that the state is entitled to receive a share of the benefits resulting from the exploitation of non-renewable natural resources, which is not to be less than that received by the concessionaire carrying out the exploitation. The Mining Act more specifically establishes that the state's share consists of various taxes and royalties, including income tax, VAT, 14 per cent of the concessionaire's profits (this is distributed to the concessionaire's employees), windfall profit tax in the case of large-scale mining and royalties depending of the category of the mining title.

The guideline for Granting Mineral Mining Concessions establishes that in order to file a request for a new mining concession, it is necessary to pay a fee equivalent to five times the current minimum wage per application (in 2016, each application costs US\$1,830). This amount is not subject to reimbursement if the interested party is not awarded the mining concession after the bidding process established in the Mining Law and the guideline.

Duties

More specifically, mining concessionaires have a number of financial obligations under the Mining Act, including the requirement to pay annual conservation patent fees, except in the artisanal mining category. The conservation patent fees payable for concessions are calculated as follows:

- for small-scale mining: a sum equivalent to 2 per cent of the current minimum wage, multiplied by the number of hectares in the concession; and
- for medium- and large-scale mining:
 - initial exploration phase: a sum equivalent to 2.5 per cent of the current minimum wage, multiplied by the number of hectares in the concession;
 - advanced exploration phase: a sum equivalent to 5 per cent of the current minimum wage, multiplied by the number of hectares in the concession; and
 - exploitation phase: a sum equivalent to 10 per cent of the current minimum wage, multiplied by the number of hectares.

In addition, mining concessionaires are required to pay fixed fees for the use of water. These fees are set out in the Water Act and the Authorisation for the Use of Water Resolution granted by the National Water Secretariat. The Ministry of the Environment also sets fees with regard to the environmental licence.

Taxes

Mining concessionaires are also required to pay various taxes, both direct and indirect. Direct taxes include income tax, which is currently 22 per cent and payable on income less expenses. They must also pay 3 per cent of their profits to their employees and 14 per cent of their profits to the state, as part of the benefits share system. Finally, if mining concessionaires send money abroad, a 5 per cent currency exit tax is payable.

As for indirect taxes, VAT, at a rate of 12 per cent is payable on goods purchased and services rendered. As previously indicated (see question 6), the amendments, introduced in December 2015, will allow mineral exporters to recover VAT as of 1 January 2018. Finally, the same amendment permits all gold acquisitions by individuals or holders of mining concessions to also have a 0 per cent VAT rate as of 1 January 2018.

Customs duties and other charges imposed by customs are payable when importing goods to Ecuador.

In addition, a windfall profit tax of 70 per cent is payable only after pre-production investments in the mining project have been recuperated. To calculate the windfall profit tax, metal prices are equal to their 10-year rolling average plus one standard deviation. For reference, the average price of gold over the past 10 years (plus one standard deviation) was US\$1,435 per ounce and the current price of gold is US\$1,231 per ounce. This year, even if a mining company could have recovered its entire investment, the low average price of gold means the application and payment of the windfall tax is very unlikely. As mentioned, this tax only applies in the large-scale mining category.

Further, with regard to municipal taxes, liability for the following taxes should be borne in mind:

- municipal patent: the maximum annual tax that can be paid, calculated according to a concessionaire's assets, is US\$5,000;
- municipal tax equivalent to 0.15 per cent of the concessionaire's assets; and
- rural land tax.

Concessionaires are also required to pay a contribution to the Superintendency of Companies, which is currently set at 0.1 per cent of the concessionaire's real assets.

Royalties

Finally, with regard to royalties, the Mining Act states that during the exploitation stage, mining concessionaires must pay a royalty depending on the mining category. Artisanal miners do not have to pay any royalty at all. Small-scale mining is required to pay a royalty equivalent to 3 per cent of the sales of the principal and secondary minerals, medium-scale mining is required to pay a royalty equivalent to 4 per cent of the sales of the principal and secondary minerals and large-scale mining is required to pay a royalty equivalent to 5 per cent of the sales of the principal and secondary minerals. The General Mining Regulations provide more detail, stating that the royalty is calculated on the gross income, less refining and transport costs.

On the other hand, the percentage of royalties payable by concessionaires carrying out non-metallic mining activities is calculated according to production costs.

Capital gains tax was recently approved for the mining industry (see question 22).

19 What tax advantages and incentives are available to private parties carrying on mining activities?

Companies that reinvest their profits in the country are entitled to a 10 per cent reduction in the income tax payable on the amount reinvested in production assets, provided the assets are to be used to purchase new machinery or equipment that are used as part of their production activities, such as the purchase of goods related to investigations or technology to improve their productivity, generate production diversity and to increase employment. Further, deductions can be made when activities are carried out in economically depressed areas or frontier zones and citizens resident in such areas are employed.

20 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

The Constitution (article 82) guarantees the principle of legal certainty, recognising clear, ex-ante legal rules that shall be respected by all the state authorities. Further, after the promulgation of the Organic Code of Production in 2010 the state created investment agreements with both domestic and foreign investors, in order to provide tax stability and other incentives.

On 29 December 2014, the government enacted an amendment to the law, which opens up the possibility to investors investing over US\$100 million to negotiate and execute a Legal and Tax Stability Agreement, thereby allowing investors to stabilise the regulations during the term of the agreement.

21 Is the government entitled to a carried interest, or a free carried interest in mining projects?

According to the Constitution (article 315) and the Ecuadorean Mining Law (article 16) the state may participate in mining projects through

public or mixed public-private enterprises in which the state is a majority shareholder.

With the enactment of the current Mining Act (article 12) the national mining company ENAMI-EP was created in order to manage mining activity for the sustainable use of mining resources. The company may carry out its duties independently, or in partnership or association with other entities, public or private, in accordance with the legal provisions.

22 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

The national assembly of Ecuador enacted, under the Organic Law for Production Incentives and Prevention of Tax Fraud, various amendments to Ecuador's income tax code, including the introduction of the taxation of capital gains, effective as of 29 December 2014. This law includes provisions for a capital gains tax on the profits derived from the direct or indirect sale of shares by companies either domiciled or with permanent establishments in Ecuador.

Further amendments to the law were enacted under Decree No. 580, which came into force on 13 February 2015, which amended or clarified the previous law. Decree No. 580 established a threshold whereby the indirect taxation does not apply to holders of shares of a non-resident company if the real value of the rights representing the capital of the company resident in, or with a permanent establishment in, Ecuador is less than 10 per cent of the real value of the company that is not a resident of Ecuador. Decree No. 580 also established a threshold whereby the indirect taxation does not apply if the cumulative annual sale of shares for an individual is less than US\$3.4 million.

23 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

Domestic and foreign parties are required to pay the same duties, royalties and taxes (see question 18).

Business structures

24 What are the principal business structures used by private parties carrying on mining activities?

While foreign companies may open a branch in Ecuador, this business structure is not often used, as not only is there a risk that the foreign parent company could be held accountable for any of the branch's liabilities, but also it is often more expensive and takes longer to set up a branch than to incorporate a local company. In addition, local companies can have broader corporate objects, whereas the corporate object of a branch must be exactly the same as that of the parent company.

As for joint ventures and trusts, although these structures are permitted in accordance with Ecuadorean legislation, they are not often used.

As such, the most common business structure is to incorporate an Ecuadorean company. There are many forms of company, the most common being corporations and limited liability companies. In many ways the forms of company are very similar; for example, they must have at least two shareholders. However, the principal differences between the two are that, in the case of limited liability companies, the maximum number of shareholders is 15 and a shareholder may only transfer shares if the prior consent of all the other shareholders is obtained. Although it depends on the needs of each interested party, as such restrictions do not apply to corporations, this is the most common form of business structure used. In the event of a joint venture, this structure can be reflected in the share ownership of the local company.

25 Is there a requirement that a local entity be a party to the transaction?

Any foreign entity is required by law to be domiciled in Ecuador. In addition, for tax planning reasons, it is quite often advantageous to incorporate a local company.

26 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

Ecuador has signed agreements for the promotion and protection of investments with Argentina, Bolivia, Canada, Chile, China, Costa Rica, Cuba,

the Dominican Republic, El Salvador, France, Honduras, Italy, Paraguay, Peru, Romania, Spain, Sweden, Switzerland, the US and Venezuela. However, the Ecuadorean state has decided to withdraw from the agreement with the US.

Additionally, Ecuador has also entered into double taxation treaties with Belgium, Brazil, Canada, Chile, China, France, Germany, Italy, Mexico, Romania, Spain, Switzerland and Uruguay and it is, therefore, advisable for foreign entities to use these jurisdictions if possible. If foreign entities wish to use jurisdictions that are considered to be tax havens, it should be noted that Ecuador imposes punitive taxes.

Financing

27 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

Financing for mining operations generally comes from abroad as there are very limited financing sources because financial entities such as banks consider mining activities to be high-risk investments. In addition, there are no government financing sources for mining activities. The mining industry, therefore, relies heavily on direct foreign investment, either by entrepreneurs, private equity funds or trusts.

28 Does the government, its agencies or major pension funds provide direct financing to mining projects?

Although government agencies and pension funds are permitted to provide direct financing to mining projects, historically, this has not occurred. Currently, in Ecuador, financing for mining projects is entirely private and, due to the lack of experience in mining, government agencies do not have any interest in providing funds for this type of project.

29 Please describe the regime for taking security over mining interests.

The personal nature of mining rights contradicts several norms of the Mining Act, which treat the said rights as if they were property rights. However, because they are personal rights, suitable guarantees can be set up for lenders to a mining project.

Although whether it is possible to pledge the mining rights arising from a mining concession is open to question, it is feasible to establish an industrial pledge over a mining concessionaire's assets. A mining concessionaire could, therefore, grant a number of distinct and independent security interests, one over the mining rights arising out of the mining concession and the other over the buildings, machinery, tools, etc, located in the mining concession, in accordance with the terms of article 576 and onwards of the Ecuadorean Commercial Code.

Both the mining rights arising from a mining concession and the contractual rights stemming from the exploitation contract can be pledged as guarantee assignments to parties lending to a project. Pursuant to the Civil Code, any right can be waived or assigned and, thus, property, personal, litigation and inheritance rights, among others, can be assigned.

The following conditions must be met to ensure that a guarantee assignment is an effective guarantee for parties lending to a mining project:

- first, a financial entity, not domiciled in the country or qualified as a subject entitled to mining rights must be allowed to be an assignee of mining rights; and
- second, the authorisation for the guarantee assignment and any other requirement needed for the formalisation thereof should be in place at the time said assignment is granted so that if the mining concessionaire defaults, the financial entity can automatically step into the project without needing any other kind of procedure or authorisation.

In addition to the above-mentioned guarantees, a pledge over the shares held by the holding company in the company operating the mining project would be another option. The holding company could also place its shares in a guarantee trust in favour of the lenders to the projects.

Finally, the guarantee system also allows for an industrial pledge on the minerals obtained from the deposit, as well as on the current and future cash flows from the sale of said minerals.

Restrictions

30 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

Generally, there are no restrictions regarding such importation.

31 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

There are no restrictions regarding the processing, export or sale of minerals obtained from mining operations. The principle of free trade is enshrined in the current legislation and minerals can be freely exported, provided all of the taxes required to be paid have been paid (see question 18).

32 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

Ecuador does not impose any form of restriction regarding the importation of funds to be used for mining operations, nor on the use of proceeds resulting from the sale or exportation of minerals.

Environment

33 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The principal environmental legislation that applies to the mining industry are the 2008 Constitution, the Environmental Management Act, the Environmental Mining Regulations, the Unified Text of Secondary Environmental Legislation, the Forestry and Conservation of Natural Areas and Wildlife Act, the application of social participation mechanisms established in the Environmental Management Act Regulations, the Water Act and the Prevention and Control of Environmental Contamination Act.

The regulation and control bodies are the Ministry of the Environment and its regional environmental offices and, with regard to water resources, the National Secretariat of Water.

34 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

Through amendments to the Mining Law introduced on 16 July 2013, the process for obtaining the environmental permits was simplified. With the new regulations, environmental permits can be summarised as follows:

- for artisanal mining: environmental fact sheets need to be approved;
- for small-scale mining: environmental licences allow concessionaires to carry out exploration and exploitation activities simultaneously; and
- for medium- and large-scale mining:
 - environmental fact sheets must be approved for the initial exploration stage, which is a different and much simpler process than the environmental impact assessments required in the past;
 - an environmental declaration will need to be approved for the advanced exploration stage, instead of the more complicated environmental impact assessment; and
 - an environmental licence will need to be approved for the exploitation on the basis of an environmental impact assessment.

When the concessionaires have completed all the requirements for the approval of the environmental licence, this must be granted within six months of the presentation of the required documentation. Should the competent authority fail to respond within this time frame, this shall be taken as tacit agreement to the commencement of mining activities. In other words, the law establishes positive administrative silence for the approval of environmental licences.

35 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

All environmental impact studies must contain an environmental management plan, which in turn must contain a plan for the partial or total closure of the mining operations. Among other details, the plan must

contain details regarding the dismantling of facilities, remediation and rehabilitation of affected areas, etc. The concessionaire must provide an annual budget for these closure activities, approved by the environmental authorities.

With regard to guarantees, the concessionaire is required to provide a bank guarantee or take out an insurance policy, which must remain in force until the total closure of mining operations, in order to guarantee compliance with the environmental management plan.

Health & safety, and labour issues

36 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The principal legal provisions regarding health and safety, as well as labour laws are set out in international agreements to which Ecuador is a party, including the International Labour Organization, the 2008 Constitution and various Ecuadorean laws and regulations, including the Labour Code and the General Labour Risks Insurance Regulations, among others. Labour law in Ecuador is complex and biased in favour of employees, and the rights granted to employees by legislation cannot be waived or challenged. The Labour Code regulates the forms of labour contracts, holidays, minimum wages, bonuses and other benefits, maternity leave, unions and collective contracts, strikes and compensation, among other matters. The Social Security Act governs social security benefits and all companies must make their employees members of the Ecuadorean Social Security Institute (IESS).

The IESS and the Ministry of Labour, together with its labour inspectors, are responsible for ensuring compliance with labour and social security legislation.

37 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

According to article 43 of the Mining Act, mining waste products in tailing ponds and waste piles are part of the mining concession, therefore, the mining concessionaire has the right to freely exploit and benefit from them. However, according to the Mining Act and the Environmental Management Act Regulations, it is necessary to acquire an environmental licence prior to exploiting and benefiting from mining waste products in tailing ponds and waste piles. The mining concessionaire must follow the regulations contained in the Mining Act, Environmental Management Act Regulations and the Unified Text of Secondary Environmental Legislation.

38 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

The Mining Act states that no more than 20 per cent of a mining company's employees can be foreign. Further, preference should always be given to Ecuadorean specialised technical personnel, and only if there are none should foreign personnel be contracted. Any foreign employees must have a work visa and comply with all applicable labour and immigration requirements, including the obligation to train Ecuadorean personnel in their field of expertise.

In addition, when hiring, mining companies must favour workers living in the area of influence of the project and have policies regarding the integration of employees' families in place.

Social and community issues

39 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

All mining activities must respect the principle of 'sumak kawsay', the principle established in the 2008 Constitution to ensure that everyone may live in a healthy and economically stable environment.

Ecuadorean legislation contains many provisions regarding these matters. There are a series of legal provisions regarding CSR in various pieces of legislation, including the 2008 Constitution, the Mining Act, the Popular Solidarity Economy Act, the Environmental Management Act and the Citizen Participation Act, among others. Additionally, international CSR

principles such as the UN Global Compact and other UN guidelines are applied within mining operations in Ecuador.

40 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

In Ecuador, the collective rights of indigenous communities, nationalities and peoples are recognised in the 2008 Constitution and the various international human rights agreements, protocols, declarations and other principles (see question 39).

Indigenous communities, nationalities and peoples must be consulted, freely and with sufficient information, regarding any plans or programmes to explore, exploit or sell non-renewable natural resources located within their land and which could affect them, either environmentally or culturally, or affect their property rights. Further, they have the right to receive a share of the benefits generated by these projects and to receive compensation for any social, cultural or environmental damage caused as a result. The consultation referred to above is mandatory and must be carried out by the competent authorities on a timely basis.

It is completely prohibited to carry out extraction activities in lands belonging to peoples who voluntarily choose to remain isolated.

41 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

Ecuador is party to a number of international treaties, the principal ones being the Universal Declaration of Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the UN Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, the ILO Convention (169) on Indigenous and Tribal People in Independent Countries and the UN Declaration on the Rights of Indigenous People.

According to the current Constitution, these international agreements are binding and, within them, the provisions of the human rights agreements prevail over the Constitution itself. In addition, the government has developed laws and regulations to protect the right to prior consultation of indigenous communities. It is also important to note that, in the light of a 2012 decision of the Inter-American Court of Human Rights, Ecuador should adopt legislative measures in order to fully facilitate the right of indigenous peoples to prior consultation, and should also modify those laws that may restrict its free and informed exercise.

Anti-bribery and corrupt practices

42 Describe any local legislation governing anti-bribery and corrupt practices.

With regards to the Ecuadorean legislation on anti-bribery and corrupt practices, it is important to consider the principles enshrined in the Constitution, as well as in the Criminal Code, the Organic Law on Transparency and Social Control and the Organic Law on Transparency and Access to Public Information. The Constitution, along with the aforementioned legislation, develops a very strict legal framework to regulate, control and sanction anti-bribery and corrupt practices.

43 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

As mentioned, there is a strict legal framework regarding anti-bribery and corrupt practices in Ecuador. To this regard, article 417 of the Constitution ratifies that all international instruments and treaties endorsed by Ecuador are part of the domestic legal system. Consequently, companies must comply with the regulations contained in the Inter-American Conventions against Corruption and the UN Convention against Corruption, among others.

It is also possible that US and Canadian companies include in their contracts the reference of the Foreign Corrupt Practices Act and Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organisation for Economic Co-operation and Development.

Update and trends

Although we have not forgotten the devastating effects that the Mining Mandate, enacted in April 2008 at the beginning of the incumbent government's term, had on the mining industry, or that the Mining Law, enacted in January of 2009, has shown to be incapable of promoting investment in this industry, there is no doubt that in recent months the government of Ecuador has redoubled its efforts to recover lost time and draft a more appropriate legal framework in order to attract investments for the mining sector.

All recent regulatory changes (see question 6) confirm the political decision of the government to support the mining industry, strengthen the legal framework and increase legal security so that new investments enter the country and substitute declining investments in oil.

There is additional relevant news from the mining community.

On 14 January 2016, Lundin Gold announced that the negotiations with the Ecuadorean government for the Fruta del Norte (FDN) exploitation contract had concluded successfully. This means that the development of FDN will begin in the coming months, with an investment expected to exceed US\$1 billion.

On 23 December 2015, the construction of the Mirador copper project under Ecuacorriente was officially inaugurated. Ecuacorriente is a joint venture between Tongling Non Ferrous Metals Group and China Railway Construction Corporation. The 30-year project includes an investment of US\$1.153 billion to build the mine and a 60,000 tonnes per day plant, US\$247 million to build a port, US\$184 million for highways and bridges, US\$217 million for a hydroelectric power station and US\$245 million for transmission lines.

On 6 December 2015, Chile's state-owned copper mining company, Codelco, and the Ecuadorean state mining company ENAMI-EP, signed an agreement that will establish the operating conditions for the joint venture responsible for the Lurimagua project in Ecuador. The project,

located in the province of Imbabura, approximately 80km north-west of Quito, involves copper and molybdenum.

Also in December 2015, INV Metals, a Canadian company, reported the completion of its more than US\$10 million investment programme in Loma Larga, a project it acquired from Iamgold. The company is proceeding with the previously announced update of its preliminary feasibility study, published in March 2015, with increased production levels of approximately 2,500–3,000 tonnes per day. The Loma Larga gold property contains an indicated mineral resource estimated at 2 million gold ounces within 10.2 million tonnes, grading 6.2 grams of gold per tonne, 35.2 grams of silver per tonne and 0.36 per cent copper, with an inferred mineral resource estimated at 0.14 million gold ounces within 0.3 million tonnes, grading 15.1 grams of gold per tonne, 1.1 grams of silver per tonne and 1.36 per cent copper, both at a net smelter return cut-off value of US\$100 per tonne.

The update to the study is underway with a budget of US\$500,000 and is expected to be completed around the middle of 2016. This will include new resource estimates; determine increased optimal production levels; and complete the associated engineering and economic studies to evaluate the feasibility and economics of the project within the large-scale framework. The company's 2016 operating budget is estimated at US\$4.5 million.

Lastly, on 19 October 2015, Odin Mining & Exploration, a company based in Vancouver, Canada, reported that it had acquired the two remaining mining concessions that make up the Cangrejos gold mining project. The company was acquired in June 2014 by Pan American Silver Corporation, whose founder and CEO Ross Beatty is a reputed mining entrepreneur loved by investors for whom he's created more than US\$4 billion in shareholder value over the years.

44 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

In 2009, the Inter-American Development Bank and the FARO Group signed an agreement to develop the 'Transparency in the Extractive Industry in Ecuador' project, focused on achieving the active participation of public and private companies linked to extractive industries, particularly in the oil sector (idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=35400790). The initiative's main objective is the application of the minimum level of the agreed-upon standards, which allow for the transparent handling of information within the sector.

In accordance with this initiative, the Constitution allows for the civil society to participate throughout different levels of government decision-making processes. The right to transparent information is recognised within the Constitution.

Nevertheless, the Organic Law on Transparency and Access to Public Information, which allows citizens to access public information, is closely related to the aforementioned initiative.

Foreign investment

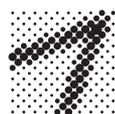
45 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

The 2008 Constitution incorporated the prohibition of real estate acquisition by foreign nationals in border areas, which extends to 20 kilometres from the frontier. This prohibition does not apply to mining concessions. However, if an area is located within the border area, it is necessary to obtain a prior authorisation from the Ministry of Defence, in accordance with article 41 of the Ecuadorean Safety Law.

International treaties

46 What international treaties apply to the mining industry or an investment in the mining industry?

As previously mentioned, Ecuador has double tax treaties with Belgium, Brazil, Canada, Chile, China, France, Germany, Italy, Mexico, Romania, Spain, Switzerland and Uruguay. Ecuador has also signed agreements for the promotion and protection of investments with a number of countries, as mentioned in question 26.



TOBAR ZVS[®]
SPINGARN

Cesar Zumarraga
Juan Fernando Larrea

czumarraga@tzvs.ec
jflarrea@tzvs.ec

Av 12 de Octubre N26-97 y Lincoln
Edificio Torre 1492, Oficina 1505, Piso 15
Quito
Ecuador

Tel: +593 2 298 6456
Fax: +593 2 298 6462
www.tzvs.ec