

THE MINING LAW
REVIEW

SEVENTH EDITION

Editor
Erik Richer La Flèche

THE LAWREVIEWS

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REVIEW

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PREFACE

I am pleased to have participated in the preparation of the seventh edition of *The Mining Law Review*. The *Review* is designed to be a practical, business-focused ‘year in review’ analysis of recent changes, developments and their effects, and a look forward at expected trends.

This book gathers the views of leading mining practitioners from around the world and I warmly thank all the authors for their work and insights.

The first part of the book is divided into 18 chapters, each dealing with mining in a particular jurisdiction. These countries were selected because of the importance of mining to their economies and to ensure a broad geographical representation. Mining is global but the business of financing mining exploration, development and – to a lesser extent – production is concentrated in a few countries, Canada and the United Kingdom being dominant. As a result, the second part of the book has five chapters that focus on financing.

The advantage of a comparative work is that knowledge of the law and developments and trends in one jurisdiction may assist those in other jurisdictions. Although the chapters are laid out uniformly for ease of comparison, each author had complete discretion as to content and emphasis.

Much of the mining sector continues to emerge from a lengthy down-cycle. The world economy continues to expand, albeit at a deliberate pace. Demand for minerals is generally sustained and exploration in many parts of the world – in Canada in particular – has rebounded.

But new risks beyond the control of miners are gathering on the horizon. The threat of trade wars, economic nationalism and increased sanctions risks derailing the mining industry just as it is reaping the fruits of its hard work.

As you consult this book, you will find more on topics apposite to jurisdictions of specific interest to you, and I hope you will find the book useful and responsive.

Erik Richer La Flèche

Stikeman Elliott LLP

Montreal

September 2018

Part I

MINING LAW

COLOMBIA

José Vicente Zapata and Daniel Fajardo¹

I OVERVIEW

Colombia is a country with a strong mining tradition, inasmuch as indigenous and afro-descendant communities located in rural areas depend on small-scale mining. The Colombian mining industry ranges from simple stone and gravel extraction to sophisticated coal, emerald, nickel and gold. In total, the Colombian mining industry extracts around 211 minerals throughout the national territory, which ranks the country as one of the most important producers of nickel and coal in South America and the second-largest producer of emeralds in the world. Nevertheless, the industry is going through a rough period, caused by different judicial and administrative decisions that have created an environment of legal instability and uncertainty for foreign investment.

The Colombian government is currently facing two international arbitration proceedings initiated by two major mining companies seeking compensation. Moreover, the Constitutional Court is about to make an historic decision with respect to the future of mining consultations in Colombia, which consists of a participation mechanism used by the municipalities to endorse or veto mining and hydrocarbon extractive projects. The debate is critical and has two opposing positions. On the one hand, the government states that local communities are lacking constitutional and legal faculties to the extent that the Constitution provides that the extraction of natural resources is a matter of national interest; and on the other hand, social organisations and local communities argue that public consultations constitute a sovereign mechanism with decision-making power.

Mining in Colombia is developed at a number of levels, with different standards of production and environmental management. Small-scale mining, for example, has the largest number of production units and, although still deficient in relation to overall performance, it is still significant in terms of generating employment and, in some cases, its capacity to add value to the extracted mineral. Medium-scale production projects are characterised by their higher knowledge of the resources and reserves, their planning strategies and their higher level of compliance with labour and mining health and safety standards. On the other hand, large-scale projects are executed under the best technical, economic, environmental and social conditions, which are very important for the country's economy not only for their capacity to generate income, but also for their social and regional impact (i.e., open-cast mining projects).

Although the mining industry is one of the fundamental pillars of the Colombian economy (in terms of foreign investment, exports and its contribution to gross domestic

¹ José Vicente Zapata is an equity partner and Daniel Fajardo is an associate at Holland & Knight.

product (GDP)), in 2017 the sector suffered a contraction, having fallen from a GDP share of 6.92 in 2015 to 6.03 per cent in 2017.² This situation derives from a combination of several factors, among others, legal instability and uncertainties, a drop in commodity prices, illegal mining and attempts by communities and environmental organisations to ban mining projects, through public consultations.

Despite the foregoing, other factors, such as the peace process with the Armed Revolutionary Forces of Colombia ending an armed conflict of more than 50 years, and the reactivation of the peace dialogues between the National Liberation Army and the government, has made Colombia an even more attractive country to foreign investors.³ Furthermore, the election of Ivan Duque as the next president of Colombia over the left-wing candidate, Gustavo Petro, is very likely to encourage foreign investment in both the mining and energy sectors.

II LEGAL FRAMEWORK

The regulatory framework for mining in Colombia is made up of regulations relating to different categories, ranging from constitutional to mainly technical norms, which regulate day-to-day mining operations.

The Colombian Constitution of 1991⁴ provides that the subsoil and non-renewable resources are state property, while also allowing for individuals to acquire rights over those resources. Additionally, in accordance with Article 334 of the Constitution, it is the state's responsibility to intervene in the use, production, operation, exploitation and distribution of the minerals obtained from the soil and subsoil, which directly translates into a specific regulation for the mining industry and allows individuals to develop these activities.

The main regulation in force is the Mining Code issued through Law 685 of 2001 (the Mining Code), which seeks to regulate the legal relationships between the state and individuals at all stages of mining (i.e., exploration, construction and assembly, exploitation, processing, transport and marketing of minerals in the soil or subsoil).

Aside from the existing regulations, the Ministry of Mining and Energy, through its Vice Ministry of Mines, issues government policies in relation to the management of the mining sector, which seek to formulate, adopt, articulate and coordinate policies and plans for the sector. Other relevant functions intended to improve the overall performance of the sector are developed by other entities subscribed to the ministry as follows.

The National Mining Agency (ANM), created through Decree 4134 of 2011, is in charge of executing the title and registration processes, technically assisting projects, and promoting and observing the obligations arising from mining concessions.

2 See Ministerio de Minas y Energía. 'Análisis del comportamiento del PIB Minero', 2017, https://www.minminas.gov.co/documents/10192/23966843/240118_comportamiento_pib_III_trim_2017.pdf/1639b17e-9a9e-42df-a4cd-7d60ef4ea930.

3 See PricewaterhouseCoopers, *Doing Business in Colombia* 2018, available at https://www.pwc.com/co/es/publicaciones/doing-business/doing_business2018.pdf. Accessed on 30 August 2018.

4 Articles 332 and 334, Colombian Political Constitution.

The Mining-Energetic Planning Unit is in charge of the comprehensive and permanent planning of the sector, of providing indexes of the development of the sector, and is responsible for the production and circulation of information required by the different stakeholders in the sector and by the entities involved in developing new policies for the sector.

The Colombian Geological Service is in charge of scientific research for the potential resources of the Colombian subsoil in accordance with the policies set forth by the Ministry of Mines and Energy.

III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

i Title

Mining regulations in Colombia follow the principle that, notwithstanding exempted rights, the subsoil and all mineral resources located therein are owned by the state and as a result may only be exploited with prior authorisation in the form of a mining title issued by the competent authority (to date, the ANM).

The Mining Code defines mining titles as concession agreements that grant the licensee a personal, exclusive and temporary right to explore and exploit minerals in the subsoil and within the contracted area. In addition, the concession agreement grants the licensee the right to acquire ownership rights of the extracted minerals in exchange for royalties. Mining titles are granted for a maximum period of 30 years, renewable for another 30 years, counted from the date of registration of the mining title before the National Mining Registry. The Mining Code is emphatic on the fact that mining titles grant rights only for the exploration and exploitation of minerals in the subsoil and, thus, any right or title to the surface where mining operations are to be conducted must be negotiated and acquired by the licensee.

Pursuant to the Mining Code, duly registered mining titles (i.e., the rights and obligations under the concession contract) at the National Mining Registry can be totally or partially assigned to a third party. For this purpose, the assignor must file a prior notice informing the ANM about its intention to transfer its rights, as well as about the corresponding assignment agreement. Upon filing, the ANM has to accept or object the assignment within 45 business days. Should the ANM not issue a motivated resolution within this period, the assignment will be understood to have been accepted and the assignment agreement will be registered in the Mining Register.

The Colombian state, and in particular the ANM, may declare the expiry or termination of a mining title at any time for any of the following causes:

- a* dissolution of the entity holding the title, except in cases where the entity ceases to exist because of a merger deriving from a takeover;
- b* a financial inability that seriously affects the performance of contractual obligations;⁵
- c* a lack of performance in work within the terms established in the Mining Code or the non-authorised suspension of such work for more than six continuous months;
- d* non-payment of the complete economic considerations on time;
- e* omission of a previous notice to the authority about the assignment of the mining title contract;
- f* non-payment of fines or the non-reinstatement of the bonds that endorse the title;

⁵ Bear in mind that if the entity has an open proceeding for its financial and legal reorganisation or restructuring, refereed provision would not apply, pursuant to regulations set forth in Law 1116 of 2006.

- g* a gross and repeated breach of regulations of technical order on mining exploration and exploitation, or of hygiene, security or labour provisions, or the annulment of necessary environmental authorisations for works and installations;
- b* an infringement of provisions on excluded and restricted areas for mining;
- i* a gross and repeated breach of any other obligation deriving from the concession contract; and
- j* when the source of the exploited minerals comes from a place different from that of its extraction, causing the economic considerations related to the title to be destined for a different municipality from that of its origin.

ii Surface and mining rights

As the regulations stand, mining titles are granted by the ANM to legal entities or individuals, whether nationals or not, on a first come, first served basis; in other words, the first entity to apply for a free area is entitled to receive a mining title in the form of a mining concession agreement. Prior to awarding a mining title, the ANM must verify the compliance of the tender requirements set forth in the Mining Code – in addition to the applicant’s economic and legal capacity, those requirements are as follows:

- a* identification of the requested area and extension and information about the land use restrictions applicable;
- b* designation of the relevant minerals subject to exploration;
- c* identification of the competent environmental authority;
- d* identification of the ethnic groups settled within the area of influence of the requested area; and
- e* indication of the terms of reference and guidelines applicable to exploration work, and the economic estimates derived from those terms and guidelines.

Foreign companies and individuals have the same rights as nationals. The main difference is that foreign companies shall set up a branch in Colombia, except in cases where activities do not exceed the term of one year.⁶ According to the External Regulatory Circular Letter DCIN-83 of the Central Bank, the branches of foreign companies are subject to the foreign exchange special regime that includes, among other things, the obligation to channel resources by filing the corresponding foreign investment forms.

In addition, pursuant to the Mining Code,⁷ mining is considered a public interest activity, which in practice enables the holder of a mining title to request expropriation and the imposition of easements over properties required for the development of the permitted mining activities.

iii Additional permits and licences

In addition to the environmental permits and licences explained below, a mining title-holder is required to take out a mining and environmental insurance policy, which must be in force during the entire project.

⁶ Articles 18, 19 and 20, Law 685 of 2001.

⁷ Article 13, Law 685 of 2001.

Pursuant to the Colombian insurance regulations (Law 1328 of 2009 and Decree 2555 of 2010), only those insurance companies authorised by the Finance Superintendence are allowed to issue insurance policies in Colombia. Thus, any insurance policy issued by a company not authorised in Colombia will not be deemed valid.

Mining title-holders are required to submit the annual mining basic form each January, with the corresponding information relating to the period from January to December of the immediately preceding year. They must also submit the semi-annual mining basic form each July, with the corresponding information relating to the period from January to June of the current year. In these forms they must indicate, *inter alia*, (1) the status of construction and exploration activities, (2) production and sales, (3) programme of work, (4) employment and work conditions, and (5) environmental issues.

iv Closure and remediation of mining projects

Aside from the insurance policy described above, there are no specific regulations in connection with the closure and remediation of mines. Closure and remediation obligations are set out in the environmental licence and on a case-by-case basis, depending on the type of mine, mineral and location.

IV ENVIRONMENTAL AND SOCIAL CONSIDERATIONS

i Environmental, health and safety regulations

The Constitution defines Colombia as a social and democratic state and, within this scope, it recognises protection of the environment as a fundamental principle and collective right. The Constitution sets out the key elements that guide the country's environmental management, namely environmental protection, commitment to sustainability and economic efficiency, fiscal control, citizen participation and respect for culture.

Law 99 of 1993 – the Environmental Law – established the Ministry of Environment (currently the Ministry of Environment and Sustainable Development (MESD)) and rearranged the public sector responsible for the environment and natural resources.

The MESD, with the President of Colombia, is the entity responsible for formulating environmental policy, considering this element as a central focus for economic and social development, growth and sustainability of the country.

The Colombian legal and institutional framework for environmental management supports global trends of sustainable development, a concept formalised in the Rio Declaration of 1992 and in numerous treaties to which the country has adhered, including the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, the Rotterdam Convention for the implementation of a prior informed consent procedure for certain hazardous pesticides and chemicals in international trade, and the United Nations Convention on Biological Diversity, among others.

ii Environmental compliance

Projects and activities that may severely affect natural resources require environmental authorisation in the form of an environmental licence. In addition, any project or activity that requires the use of access to natural resources must obtain a specific environmental permit. In the case of mining, an environmental licence must be granted either by the Environmental Licence Agency or by a regional environmental authority. Furthermore, when it comes to

environmental authorisations, the main regulation is Decree 1076 of 2015, which, among other things, defines the environmental authority in charge of granting environmental licences for mining projects based on the projected production.

Moreover, pursuant to Decree 1076 of 2015,⁸ an environmental licence for mining is only required for the construction, installation and exploitation phases. During the exploration phase, the mining operator must obtain the necessary and individual environmental permits depending on the natural resources to be used or affected.

iii Third-party rights

In addition to the foregoing, two particular considerations regarding third-party rights must be indicated.

First, as a rule of constitutional and international recognition, projects and activities that may potentially affect cultural diversity must consult all ethnic communities located within the area of influence prior to commencement of any activity. Prior consultation is a fundamental right that seeks to protect the cultural, social and economic integrity of ethnic groups and provide them with the right to participate in the decision-making process regarding measures or projects, activities or other work to be carried out in their territories.

The process for prior consultation, regulated through Presidential Directive 10 of 2013 and Decree 2613 of 2013, is a joint activity to be carried out between the representatives of the projects and the Ministry of Internal Affairs whenever the latter certifies the presence of ethnic communities in the area of influence of a project or activity. In brief, the consultation process must follow these steps:

- a* certification of the existence of ethnic communities in the specific territory – issued by the Ministry of Internal Affairs;
- b* participation of the ethnic communities in the production of environmental studies;
- c* consultation hearing presided over by the pertinent environmental authority;
- d* declaration of agreement or disagreement regarding the impact assessment and protection measures proposed in the management plan;
- e* making the decision public; and
- f* monitoring the decision.

If no agreement is reached, the existing regulation provides for an extended deadline for discussion. Should the parties not enter into an agreement after the extension, the disagreement will be formally stated as the result of the process, and the pertinent environmental authority will decide whether or not to issue an approval.

It is of utmost importance to note that the Constitutional Court, when deciding on constitutional actions regarding tutelage,⁹ has ruled that the failure to undertake the consultation process results in a violation of fundamental rights and, as a result, has ordered the temporary suspension of the project or activity.¹⁰

8 Articles 2.2.2.3.2.2 and 2.2.2.3.2.3, Decree 1076 of 2015.

9 The 'Acción de Tutela' is a constitutional action with a special procedure that seeks the protection of fundamental rights.

10 See www.urosario.edu.co/getattachment/340e1f11-842c-49d4-8341-6a6a0349dd27/Corte-Constitucional-ordena-suspension-del-proyect/.

On the other hand, during 2016, the Constitutional Court ruled as unconstitutional Article 37 of the Mining Code, which stated a prohibition for regional entities to restrict mining activities in their territory. In other words, to date, regional entities (e.g., the municipalities) have been legally allowed and entitled to restrict or simply ban mining activities in their territory.¹¹ Subsequently, the Constitutional Court decided that regional entities have the competence to regulate the use of the soil and to guarantee environmental protection, even if when exercising the said prerogative they end up prohibiting mining activity.¹²

As a corollary of the above, local authorities have the power to convene public consultations, at which the inhabitants of the territories where mining projects are to be executed can vote on whether or not they agree with these projects, and to veto them in the event of a negative vote. Following this, according to the Colombian Mining Association, more than 100 municipalities have shown interest in banning mining activities in their territory and several municipalities have chosen to set up public consultations to determine whether they wish to allow mining activities to be carried out in their territory or not. As at 31 December 2017, approximately eight territories are known to have chosen to prohibit mining activities within their territories.¹³

iv Additional considerations

Under Colombian law, given that the environment is subject to special protection by the Constitution, both the legislator and the government are legally authorised to broaden existing regulations to protect the environment and guarantee the fundamental rights related to it, to the extent that acquired rights are not protected in relation to environmental issues.

The Constitutional Court has ruled that there are no acquired rights regarding environmental matters,¹⁴ and has declared the referred article to be unconstitutional. In 2011, the Colombian Congress established that mining activities could not be developed in the *páramos* (high, treeless plateaux).

Article 34 of the Mining Code establishes that it is not possible to carry out mining activities in areas declared by the Colombian government as areas for the protection and development of renewable natural resources or environmentally protected areas (exclusion areas), such as areas included in the national parks system, regional natural parks and forest reserves.¹⁵ Article 34 does not specifically mention *páramo* areas as exclusion areas. However, the Article was modified by Article 3 of Law 1382 of 2010, to express include *páramo* areas as one of the areas protected by that Law. Law 1382 of 2010 was later declared to be unconstitutional.

The National Development Plan of 2011, which initially sought to protect acquired rights before February 2010 and established that protection and environmental authorisation could continue, but with no possibility of extension,¹⁶ was later also declared to be unconstitutional. As of the issuance of Decision C-035 of 2016, the Constitutional Court formally banned all mining activities within *páramo* areas, regardless of expired rights that existed prior to

11 Constitutional Court of Colombia, Decision C-237 of 2016.

12 Constitutional Court of Colombia, Decision T-445 of 2016. See Decision A-053 of 2017.

13 See www.eltiempo.com/colombia/otras-ciudades/municipios-de-colombia-que-le-han-dicho-no-a-la-mineria-131988.

14 Constitutional Court of Colombia, Decision C-035 of 2016.

15 Article 34, Law 685 of 2001.

16 Article 173, Law 1753 of 2015.

February 2010. On 2014, the MESD issued Resolution 2090 containing the delimitation of the area known as *Páramo de Santurban*, within which two major mining projects at exploration stage are located. On 2017, the Constitutional Court issued Ruling T-361 of 2017, which annulled Resolution 2090 on the grounds of a lack of participation by the communities located within the *Páramo de Santurban* area, and ordered the MESD to issue a new delimitation to be developed under a participating, effective and deliberative procedure. At the time of writing, the *Santurban* delimitation is yet to be issued.

V OPERATIONS PROCESSING AND SALE OF MINERALS

i Processing and operations

Pursuant to the Mining Code and applicable regulations, a typical mining project is divided into three main stages, each of which starts following completion of the previous stage:

- a* Exploration for a period of three years from the registration of the mining title before the National Mining Registry. As indicated above, at this stage no environmental licence is required; however, activities must be conducted under certain specific parameters set out in the Environmental Guidelines issued by the Ministry of Mines and Energy. Should the title-holder decide to continue to the next stage, and prior to the end of the exploration phase, it must submit a work programme to the ANM, which must contain detailed information about the prospectivity of the area, a programme of work and the economic expenditure assigned to the next stage.
- b* Construction and assembly for a period of three years, which comprises the necessary work and infrastructure to initiate the exploitation of minerals. Prior to initiating construction and exploitation operations, the title-holder must obtain an environmental licence.
- c* Exploitation stage, which commences upon completion of the construction and assembly stage with a duration equivalent to the remainder of the initial term minus the two previous phases.

As the regulation stands, each of the phases of a mining project must take place continuously and therefore production may begin at the second stage only exceptionally.

Finally, as regards mining operations, it should be noted that the ban on the use of mercury in mining in Colombia became effective as of 16 July 2018. This is a result of the issuance of Law 1658 of 2013, which established a five-year term for the total elimination of the use of mercury in mining activities.

ii Sale, import and export of extracted or processed minerals

Colombian regulations do not set out any restrictions in connection with the sale, commercialisation or export of minerals that have been extracted under a duly issued mining title. However, the following entities must register with the Registry of Mining Traders: (1) traders who buy and sell minerals regularly in order to transform, benefit, distribute, intermediate, export or consume the minerals; (2) mining processing plants; and (3) trading houses that buy gold, silver, platinum, precious and semi-precious stones from licensed miners.¹⁷

¹⁷ National Mining Agency, 'ABECÉ RUCOM', www.anm.gov.co/sites/default/files/DocumentosAnm/abc-rucom.pdf.

iii Foreign investment

Foreign nationals are granted the same civil rights as any Colombian.¹⁸ Other than limitations under the Constitution or other laws, foreign nationals in Colombian territory are granted the same guarantees as Colombians.¹⁹

Foreign investors can undertake their investment either personally or by the incorporation of a branch of a foreign company or by incorporating a Colombian company. The process of incorporating a subsidiary or a branch office usually takes two to three weeks.

To attract foreign investment, Colombia has implemented a policy of negotiation and ratification of international investment agreements, which includes bilateral investment treaties (BITs), free trade agreements with chapters on investment and double tax agreements. Moreover, Colombia is party to various international agreements: the Multilateral Investment Guarantee Agency, the International Centre for Settlement of Investment Disputes (ICSID), the Overseas Private Investment Corporation and the Agreement of Cooperation for Emerging Markets. Colombia has entered into BITs with Belgium, Chile, China, India, Japan, Peru, Spain, Switzerland and the United Kingdom.

Through Presidential Directive No. 4 of 2018, the Colombian presidency has limited approvals of international arbitration clauses, as they require a prior and favourable decision by the Director of the State Legal Defence Agency. Additionally, approval of arbitration clauses in state contracts under ICSID rules is now prohibited.

VI CHARGES

i Royalties

Companies committed to any production of renewable natural resources shall be liable to a royalty in favour of the state. Declaration, liquidation and payment of royalties must be made by mining operators in either monthly or quarterly instalments, depending on the mineral exploited, for which a unique form has been designed by the ANM. The 'Form for Declaration of Production and Liquidation of Royalties, Compensation and other Fees for the Exploitation of Minerals' was developed in accordance with stipulations in Decrees 145 of 1995 and 600 of 1996.²⁰

18 Article 100, Colombian Political Constitution.

19 *ibidem*.

20 Colombian Mining Information System, 'Proceso De Liquidación De Regalias': www.simco.gov.co/Default.aspx?tabid=116.

Royalties must be paid on mine-head production based on the production volume and the type of extracted mineral. Royalties are independent from any tax payments.

| Material | Percentage |
|--|-------------|
| Construction minerals, limestone, plaster, clay, gravel | 1 per cent |
| Non-metallic minerals | 3 per cent |
| Metallic minerals | 5 per cent |
| Radioactive minerals | 10 per cent |
| Salt | 12 per cent |
| Platinum | 5 per cent |
| Alluvial gold | 6 per cent |
| Gold and silver | 4 per cent |
| Iron and copper | 5 per cent |
| Nickel | 12 per cent |
| Coal (exploitation of less than 3 million tons per year) | 5 per cent |
| Coal (exploitation of more than 3 million tons per year) | 10 per cent |

ii Taxes

The mining industry is taxed under the general Colombian taxation regime at both a national and regional level (i.e., there are no special taxes, deductions or incentives dedicated exclusively to the mining sector). While at the national level taxes apply to all residents and with the same tariff, the tariff for regional taxes varies from one region to another.

The current Colombian fiscal regime consists of a combination of the following taxes:

- a* corporate income tax (33 per cent tariff);
- b* the corporate income tax surtax (4 per cent tariff for 2018). The corporate income tax (CIT) rate for Colombian entities is 33 per cent (as of fiscal year 2018). In fiscal year 2018, the CIT rate will be 33 per cent + 4 per cent (i.e., 37 per cent) and as of fiscal year 2019 and thereafter, it will be 33 per cent;
- c* industry and commerce tax (ICA). An event that is subject to ICA is one involving the exercise or performance, directly or indirectly, of commercial, industrial or service activities within the jurisdiction of a municipality. ICA tax rates vary from 0.2 per cent to 1.2 per cent, depending on the nature of the activity to be performed in the respective municipality. The full 100 per cent of ICA paid is deductible for income tax purposes;
- d* bank debit tax. Colombia currently has a bank debit tax in place. This tax is withheld by the financial authorities and has a taxable base of 4 per 1,000 applicable on any withdrawal or transfer made from savings or cheque accounts. The full 100 per cent of bank debit tax paid is deductible for income tax purposes;
- e* value added tax (VAT). All goods and services purchased locally are subject to the standard rate of 19 per cent. This rate applies to all supplies of goods or services, unless a specific provision allows an exclusion from VAT or application of a reduced rate; and
- f* royalties.

In addition, all goods and services purchased locally are subject to 19 per cent VAT.

| Tax | Definition – scope | Level | Tariff |
|---|---|--------------|------------------------------|
| Income tax | The remuneration of the factors of production, all net income, that increase the equity* | National | 33 per cent |
| Income tax surtax | Established in 2018, surtax is a tax surcharge for income tax | National | 4 per cent (2018) |
| Industry and commerce tax | The remuneration generated from service, industrial and commercial activities carried out in the municipality | Regional | Between 0.2 and 1.2 per cent |
| Bank debit tax | Any withdrawal or transfer from savings or cheque accounts | National | 4 per 1,000 |
| Value added tax | All goods and services purchased locally | National | 19 per cent |
| * Foreign companies that do not have a permanent establishment in Colombia should pay income tax at 40 per cent | | | |

iii Tax incentives

As an incentive to increase investments in mining exploration, the Colombian government has established a regulatory framework to allow the issuance of Tax Refund Certificates (CERTs), which grant a monetary benefit to be used in the payment of taxes, contributions and fees. In the mining sector, the CERTs correspond to a percentage of the mining investment. For tax purposes, the value of the CERT does not constitute taxable income or capital gain for the entity or individual who receives or acquires it and it may be used for the payment of taxes.

Note that investments in the mining sector that may be entitled to a tax incentive are those that aim to maintain or increase the production of current projects, to accelerate the projects that are in transition (from construction and assembly to exploitation) and to increase exploration projects, fulfilling certain requirements.

iv Duties

Depending on the stage of the project (exploration or construction and assembling), concessionaires shall pay a surface canon. This fee must be calculated annually and is equivalent to one minimum legal daily wage per hectare if the area in question is less than 2,000 hectares. If the area is between 2,000 and 5,000 hectares, the fee will be two minimum legal daily wages per hectare. If the area is larger than 5,000 hectares, but smaller than 10,000, the fee will be three minimum legal daily wages per hectare.

iv Other fees

In addition, if a party establishes an easement for exploration or exploitation of mining activities, it must pay compensation to the owner of the land for the lien created in its land. Similarly, if a party needs to expropriate a piece of land to carry out mining exploitation activities under a concession contract, it must pay prior and fair compensation to the owner.

Finally, after settlement of the concession contract, the mining right-holder must pay all the costs incurred in adapting the land for those activities. The mining environmental policy will secure the relevant obligations during the term of the contract.

Under Law 685 of 2001 and Resolution 388 of 2014, the title-holder must take out a mining and environmental insurance policy. During the exploration phase, the insured amount must be 5 per cent of the value of the planned annual exploration expenditure. For the construction phase, the insured value must be 5 per cent of the planned investment for assembly and construction. During the exploitation phase, the insurance policy must cover 10 per cent of the result of multiplying the amount of estimated annual production by the mine pit price of the extracted mineral, as established by the Colombian government.

VII OUTLOOK AND TRENDS

As has been previously stated, legal instability and uncertainty has seriously affected the Colombian mining industry to the extent that, to date, investments amounting to approximately US\$7,000 million are yet to become a reality.²¹ According to the ANM, Colombia produced approximately 89.4 million tons of coal in 2017 (a 1 per cent decrease compared to 2016)²² and 41.06 tons of gold (a 34 per cent decrease in production compared to 2016). However, some mining sectors showed signs of growth, such as nickel, emeralds and construction materials, which, compared to 2016, grew by 9 per cent, 5 per cent and 5 per cent respectively.²³

Notwithstanding the above, as of the issuance of Decision C-035 of 2016, which formally banned all mining activities within *páramo* areas, Decision C-192 of 2016, which restated the view of the Constitutional Court according to which there are no acquired rights in environmental matters, and Decision T-445 of 2016, which allows territorial entities to hold public consultations and decide whether mining activities are allowed in these territories or not, the outlook for mining in Colombia is still uncertain. In addition, with the announcement by several mining companies of their intention to enter into dispute resolution mechanisms with Colombia at various international arbitration courts, the prospect for foreign investment is also uncertain.

Finally, it is important to note that the election of Ivan Duque as the new President of Colombia has generated a favourable outlook for the mining sector, in particular with respect to legal stability and certainty. Among the proposals announced by Ivan Duque during his presidency campaign are (1) a limitation of constitutional actions regarding tutelage to prevent their use being abused,²⁴ (2) unification of rulings issued by the highest courts, and (3) the regulation of public consultations for projects of national interest, such as hydrocarbons and mining.

21 See Portafolio: www.portafolio.co/economia/pib-minero-se-contrajo-en-2017-afectado-por-la-incertidumbre-juridica-512731.

22 See Agencia Nacional de Minería: www.anm.gov.co/?q=colombia_registra_produccion_record_de_carbon_en_2016_principal2.

23 See Agencia Nacional de Minería: <https://www.anm.gov.co/?q=asi-se-movieron-las-cifras-de-produccion-de-minerales-en-2017>.

24 Constitutional legal action to demand protection of constitutional rights.

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