THE OIL AND GAS LAW REVIEW

Sixth Edition

Editor
Christopher B Strong

THE LAWREVIEWS

THE OIL AND GAS LAW REVIEW

Sixth Edition

Reproduced with permission from Law Business Research Ltd
This article was first published in October 2018
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Christopher B Strong

THE LAWREVIEWS

PUBLISHER
Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGERS
Thomas Lee, Joel Woods

SENIOR ACCOUNT MANAGER
Pere Aspinall

ACCOUNT MANAGERS
Jack Bagnall, Sophie Emberson, Katie Hodgetts

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCHER
Keavy Hunnigal-Gaw

EDITORIAL COORDINATOR
Gavin Jordan

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Martin Roach

SUBEDITOR
Janina Godowska

CHIEF EXECUTIVE OFFICER
Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-912228-65-2

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

AB & DAVID

ALLIANI & BRUZZON

AMERELLER LEGAL CONSULTANTS

BIRD & BIRD LLP

CUATRECASAS

DLA PIPER WEISS-TESSBACH GMBH

EVERSHEDS SUTHERLAND (INTERNATIONAL) LLP

FITZWILLIAM, STONE, FURNESS-SMITH & MORGAN

GIDE LOYRETTE NOUEL

GORRISSEN FEDERSPIEL

HOLLAND & KNIGHT

HUNTON ANDREWS KURTH LLP

J SAGAR ASSOCIATES

KVALE ADVOKATFIRMA DA

MATTOS FILHO, VEIGA FILHO, MARREY JR E QUIROGA ADVOGADOS

MCCARTHY TÉTRAULT LLP

MINTERELLISONRUDDWATTS

OMV AKTIENGESELLSCHAFT

ORRICK, HERRINGTON & SUTCLIFFE

PRIMERA AFRICA LEGAL

SÁNCHEZ DEVANNY

VIEIRA DE ALMEIDA

VINSON & ELKINS LLP

ZHONG LUN LAW FIRM

CONTENTS

PREFACE

2018 has been a transitional period for the international oil and gas industry.

With the industry enduring a fourth straight year of low oil prices, and with no prospects for a significant increase in sight, participants in the industry have been forced to adapt. Oil companies must continue to be disciplined, allocating scarce capital only to their best prospects, and shelving less promising projects for future years. Some in the industry have already started to worry that by reducing capital expenditures the seeds of a future price shock are being sown.

Oil-producing countries have been in a similar pinch. Having become accustomed to triple-digit oil prices, the 'new normal' of US$50 oil has produced a grim budgetary reality. Producing countries that had only recently tightened fiscal terms in response to high oil prices must now considering loosening them again in order to attract investment. In Saudi Arabia, the world's largest producer, plans are afoot to sell a minority stake in the company to foreign investors in order to raise cash to diversify the country's economy, a move that would have been unthinkable a few years ago.

Yet amid the ongoing turbulence there are opportunities. The necessity for existing companies (many of which are over-leveraged and cash strapped) to offload parts of their portfolios will create opportunities for new, leaner competitors to arise. US shale producers, whom many were prepared to write off in the low oil price environment, have made dramatic improvements in efficiency and learned to calibrate their acreage to different oil price environments, focusing on their richest prospects when prices are low and adding lower-value opportunities as prices escalate. Among the major oil exporting countries, low oil prices have provided the impetus for long-needed structural reforms to diversify their economies beyond the extraction of petroleum.

The international oil and gas industry has always been cyclical. Although the last three years have been eventful, they are by no means the first downturn the industry has faced, nor the last. I have no doubt that the years ahead will continue to present challenges and opportunities for practitioners in this most dynamic of industries.

As always, I would like to thank our contributing authors for their outstanding contributions to this year's edition of *The Oil and Gas Law Review* and also the publishers at Law Business Research for their tireless work in bringing this all together.

Christopher B Strong
Vinson & Elkins LLP
London
October 2018

Chapter 8

COLOMBIA

José V Zapata Lugo and Claro M Cotes Ricciulli[1]

I INTRODUCTION

In July, 2018, Colombia held a new presidential election that concluded with the victory of the young candidate, Ivan Duque, former senator from the right-wing Democratic Centre party. The new government has a vision of attracting foreign investors through the implementation of regulations that promote industries such as the oil and gas sector. To that extent, various governmental agencies have been focusing on evaluating the best manner to improve the rule of law so as to allow for increased interest in the oil and gas sector. Of particular attention will be defining the terms and conditions pursuant to which unconventional reservoirs will be sustainably developed and whether the new government will support such activities in a timely manner. Oil average production has slightly decreased in comparison to 2017, particularly when production on this year also decreased significantly in relation to the previous ones, fluctuating from an average production of 854 thousand barrels per day (KBPD) in 2017, to 848 KBPD up to May 2018.[2] This confirms that the creation of exploration incentives continues to be a matter of urgency, considering the favourable conditions in neighbouring countries and that exploration activities continue to drop. However, in recent months the outlook for the sector has been very favourable, as, in comparison to the same months of the immediately preceding year, higher production has been achieved.[3] Similarly, the National Hydrocarbons Agency (ANH) has seen increased proposals for new exploration and production contracts, and alongside Agreement 02 of 2017 and upcoming permanent contracting conditions, Colombia continues to advance in its attempt to provide structural reorganisations to reactivate the oil and gas industry, as well as legal stability that guarantees the rule of law, which was profoundly needed.

On the other hand, the current implementation of the peace process should continue to increase investors' appetite for developing their business in Colombia, which may be enhanced by the issuance of the Agreement 02, 2017 and its potential 2018 modifications. In addition, the government has expressed its strong intention to bet for offshore production, which has been evidenced, for example, in new discoveries in the Colombian Caribbean sea.[4]

---

1 José V Zapata Lugo is a partner and Claro Manuel Cotes Ricciulli is an associate at Holland & Knight.

2 http://www.anh.gov.co/Operaciones-Regalias-y-Participaciones/Sistema-Integrado-de-Operaciones/Paginas/Estadisticas-de-Produccion.aspx.

3 www.portafolio.co/economia/produccion-de-petroleo-en-colombia-crecio-en-abril-517210; www.portafolio.co/economia/produccion-de-petroleo-en-colombia-en-el-mes-de-mayo-de-2018-518082.

4 https://www.ecopetrol.com.co/wps/portal/es/ecopetrol-web/nuestra-empresa/sala-de-prensa/boletines-de-prensa/boletines-2017/boletines-2017/purple-angel-1-encuentra-gas.

In 2003, the Colombian government enacted Decree 1760 by means of which two substantive changes for the Colombian petroleum industry were adopted: (1) the creation of the ANH as a special administrative unit to be in charge of the administration and regulation of hydrocarbons in Colombia (at a later stage, Decree 4137 of 2011 modified the legal nature of the ANH and converted it into a state agency); and (2) the transformation of the legal nature of Ecopetrol into a corporation (by means of Law 1118 of 27 December 2006, Ecopetrol adopted the legal nature of partially state-owned company) dedicated exclusively to the upstream and downstream business inside and outside Colombia, and, therefore, it submitted the applicable regime of its acts and agreements to private law.

With those changes, Colombia started to be a more competitive state as Ecopetrol became another competitor in the market, leaving the sole regulatory and administrative management of hydrocarbons to the ANH. However, since 2014, exploratory activities have been in steady decline, but lately showing some signs of a slight recovery.

With the recent election of new president Ivan Duque, the country expects support from government for the industry reactivating exploration activities, which should also increase as a result of the implementation of the peace process. In 2016, a total of 21 exploration wells were drilled in Colombia, compared with the 54 wells drilled in 2017.[5] Oil reserves in 2017 were estimated at 1,782 million oil barrels,[6] increasing from 2016, which had an estimate of 1,665 million oil barrels. Nevertheless, they still represent a significant decrease compared to the 2,002 million oil barrels reserve estimated in 2015.[7]

Regarding gas production, as of April 2018 compared to 2017 one can detect a minor increase of 2.1 per cent in annual production, as production reached 938,771 million cubic feet per day. However, it continues to be a low production level compared to the 1,133 million cubic feet per day produced in 2015 and the average production of 1,081 million cubic feet per day produced during 2016.[8]

There are still changes that need to be incorporated since the government must provide and ensure greater legal stability for investors, especially in matters relating to communities and social factors (prior consultation, territorial entities decisions, public consultations and the veto power), as well as establishing contractual terms that are much more attractive to investors.

II LEGAL AND REGULATORY FRAMEWORK

In Colombia there is a clear differentiation between the oil and gas regulations: upstream, midstream and downstream. The midstream and downstream levels gas regulation must be differentiated in multiple aspects from that relating to crude oil. The 1991 Constitution determines that the state is the owner of the subsoil and of non-renewable natural resources, without prejudice to grandfathered rights.[9] Similarly, the basis for royalties is constitutionally

5 https://www.eltiempo.com/economia/sectores/exploracion-de-petroleo-pasa-por-buen-momento-en-colombia-211122.

6 www.portafolio.co/economia/aumentaron-las-reservas-de-petroleo-del-pais-516729.

7 https://www.datos.gov.co/Minas-y-Energ-a/Reservas-De-Petroleo/2njd-akei/data.

8 www.anh.gov.co/Operaciones-Regalias-y-Participaciones/Sistema-Integrado-de-Operaciones/Paginas/Estadisticas-de-Produccion.aspx.

9 Article 332 of the Colombian Political Constitution.

defined by establishing that any production of non-renewable natural resources shall entail a royalty in favour of the state in addition to any further right or compensation that is agreed to.[10]

As to the underlying titles or agreements that allow for the exploration and exploitation of hydrocarbons, Colombian regulations refer to: (1) association contracts (the association agreements) still in effect with Ecopetrol; (2) the technical evaluation agreements (TEAs); and (3) exploration and production contracts (E&Ps) entered into with the ANH. These various forms of contractual agreements allow any party to develop its activities in the oil and gas sector. As to the regulations in place for the development of hydrocarbons activities, rules have been issued essentially by the Ministry of Mines and Energy while the ANH has defined particular rules for TEAs and E&Ps in its condition as a state agency in charge of executing these contracts with the corresponding participants. A final set of rules are those that regulate environmental and social conditions for the development of operations in oil and gas. One must remember the various timelines that each of these sets of regulations entail and the manner in which exploration and production activities must be completed.

The hydrocarbons sector in Colombia has been developed since the early 1940s.[11] The Colombian Petroleum Code (the Code) dates back to 1953 as a significant starting point for all matters associated with oil and gas. Parties seeking to enter into an association agreement, a TEA or an E&P contract will be required to verify whether their legal, financial, technical, operational, environmental and social capacities allow them to farm in or access a new underlying agreement, according to ANH capacity thresholds.

As per the midstream and downstream levels, gas regulation is separated in a significant manner from oil regulations. Considering the technical definitions, gas regulations encompass aspects ranging from contractual relations, technical standards, transport conditions, sale terms, distribution, consumption and heads of power to further regulate such matters. The Commission on Regulation of Energy and Gas (CREG) is the principal governmental entity that regulates these aspects since its inception under Laws 142 and 143 of 1994. Gas has been considered directly linked to public utilities and fundamental constitutional rights. The belief that gas belongs to a more local market has led to this separate set of rules.

i Domestic oil and gas legislation

As a civil law system, Colombia has a tradition of sector-specific regulations affecting all aspects of upstream, midstream and downstream operations. When reference is made to oil and gas at the upstream level, the regulatory framework includes norms, technical rules, structure regulations and historic norms.

Framework regulations are essentially found in the Petroleum Code. While various aspects of such Code have undergone modifications since 1953, the Code continues to be of fundamental relevance to many aspects of the oil and gas industry, providing the key regulatory guidelines. The perception of the petroleum industry as of public interest in aspects of exploration, production, refining, transport and distribution, is a relevant factor.[12] Also, all data obtained during the course of scientific, technical, economic or statistical activities must

10 Article 360 of the Colombian Political Constitution.

11 Decree 968 of 18 May 1940.

12 Article 4 of Decree 1056 of 1953.

be provided to the Colombian government, as part of the duties that parties involved in the oil and gas industry must abide with.[13] Aspects relating to contracts, royalties and fines have since been updated by further regulations.

Technical rules that were contained in the Petroleum Code have also been updated. Decrees 70 of 2001 and 3724 of 2009, granted regulatory powers to the current Ministry of Mines and Energy. Accordingly, Resolution 181495 of 2009 was issued. This Resolution fully comprehends the main regulatory framework for the exploration and production of hydrocarbons with the purpose of maximising their recovery and avoiding waste.[14] Resolution 181495 (updated by Resolution 40098 of 2015) establishes that the Ministry of Mines and Energy is in charge of all activities regulated in the norm, issuing any technical rules and administrative decisions associated with the regulation, and imposing applicable sanctions for breaches thereof. Regulated operations are expected to comply with national and international standards, including in particular AGA, API, ASTM, NFPA, NTC-Icontec, Retie or similar as found in the petroleum industry.[15] The resolution recognises that it is subject to all such regulations pertaining to environmental protection and sustainability as well as consultation requirements with communities, health and safety requirements, and labour conditions defined under the ILO Agreements 174 and 181. Parties to an underlying agreement must understand the particularities of the definitions found in Resolution 181495. Colombian law is strict in defining terms and conditions, which when not clearly understood or applied by the interested party can lead to breach of obligations or loss of rights under the underlying agreement. This rigidity has been compounded by the many agencies with oversight over public agencies and officials. The system consists of a prior authorisation and reporting structure. Any activity or operation to be undertaken by the operator of record under an oil and gas contract requires the due filing of documentation and forms before the Ministry of Mines and Energy for them to approve and control activities development under the contracts. There have been recent attempts to simplify this system, easing the operational burdens for contractors. However, the system seeks to ensure that rules are fully respected and that expected activities by an operator are fully undertaken.

In addition to regulations under Resolution 181495, the Resolution 09341 sets forth the technical parameters applicable to the exploration and exploitation of unconventional reservoirs. On the basis of this regulation the government sought to ensure the sustainable development of non-renewable natural resources based on appropriate industry practices. It should be noted that Resolution 09341 of 2014 abrogated Resolution 189742 of 2012, except for the articles that regulate the 'operational agreements' understood as those entered with the operator with the titleholders of mineral rights whenever unconventional reservoirs overlap with mining titles. Pursuant to Resolution 09341 of 2014 the exploration and exploitation procedures not regulated in Resolution 09342 of 2014 shall be governed by the procedures applicable to conventional reservoirs in Resolution 181495. Unconventional reservoir potential has provoked, as in other jurisdictions, debates on fracking. In 2013, Decree 3004 of 2013 was issued by the Ministry of Mines and Energy, seeking to define a framework for technical rules. This resulted in the issuance of a further set of rules contained in Resolution 90341 of 2014 from the Ministry of Mines and Energy. The importance of unconventional hydrocarbon plays was further evidenced by the parallel work undertaken

13 Article 7 of Decree 1056 of 1953.

14 Article 1 of Resolution 181495 of 2009.

15 Article 4 of Resolution 181495 of 2009.

to issue regulations addressing environmental concerns for the exploration of these reservoirs under Resolution 0421 of 2014 of the Ministry of Environment and Sustainable Development and the set of rules and contract drafts for unconventional reservoirs issued by the ANH in Agreement No. 02 of 2017, which included provisions on that matter that were under Agreement 3 of March 2014. It is notable that the Ministry of the Environment has already issued terms of reference for the exploration of unconventional reservoirs, but the government is still working on applicable environmental parameters for the exploitation of said resources. Therefore, even though there is currently a 'developed' hydrocarbons regulation for exploration and production of unconventional resources, environmental regulations, which are complementary and must be abided by to conduct hydrocarbon operations, are still behind on how to produce said resources. Environmental licences that allow companies to develop unconventional reservoirs must be granted by the National Environmental Licensing Authority (ANLA), in order to maximise Colombia's potential in this regard, and attract foreign investment for the industry.

As per the transportation regulations, technical regulatory conditions are included under Resolution 72145 of 2014, which regulates the transport of crude by pipelines, and Resolution 72146 of 2014, which defines tariffs for transport via such pipelines. Resolution 72145, in line with Decree 1056 of 1953,[16] recognises that the transport of crude is a public service, which implies that parties undertaking such activity must operate in accordance with regulations applicable to public utilities. After many years of discussion as to whether or not public access was to be granted to oil pipelines, the regulation to ensure free access to parties without any form of discrimination was granted in accordance with the Petroleum Code,[17] defining a set of fair and reasonable transport principles and prices. In furthering the principles of the Code,[18] the government's preferential right in the transportation of hydrocarbons was reiterated. This right, which is held by the government and exercised through the ANH, in relation to the capacity of the oil pipeline is defined for public pipelines in terms of the right of transport of state crude and with respect to private pipelines for royalty crude. This right extends to 20 per cent of the calculated capacity of the pipeline as constructed. Another aspect that merits comment is the fact that Resolution 72145 required transporters to issue a manual for transportation and to make such manuals public. Transportation manuals must include a full description of the system, its capacity and connection terms as well as access conditions and applicable tariffs. Colombia holds more than 8,500km, including pipelines and flowlines; 5,467km of pipelines and 3,100km of flowlines.[19]

ANH is currently in charge of administrating TEA and E&P contracts, leading to considerations of contract rules. Currently Agreement 02 of 2017, issued by the ANH, included several modifications and defined rules pursuant to which a participating interest in such contracts could be held; it also established contract rules and how to evidence capacities required to be a contractor under an oil and gas contract. With Agreement 02, the ANH established rules for the award of hydrocarbon blocks, and it also determined the criteria for exploration and exploitation of hydrocarbons in Colombian territory. These criteria include selection of contractors, and management, execution, termination, liquidation, monitoring, control and supervision of E&P contracts.

16 Article 212 of Decree 1056 of 1953.

17 Article 47 and following of Decree 1056 of 1953.

18 Article 196 of Decree 1056 of 1953.

19 www.ecopetrol.com.co/especiales/mapa_infraestructura.htm.

Key modifications include the determination of contractual principles that pursue the observance of the rule of law, so that contractors have a due process guarantee in their relations with the government, and protection towards parent companies as the government must endeavour to solve its contingencies with the local entities. Also, work programmes are not locked to currency amounts, but to a new points systems that provides benefits as it avoids eventual currency differences, and allows an obligations exchange amongst contractor and the contracting party. In addition, the Agreement clearly states the terms, conditions and obligations arising from contracts. It also includes measures to mitigate the effects of falling international oil prices, and limits the rights of operators and non-operators, establishing less stringent participation conditions for the latter, differentiating also offshore and offshore operations, such as conventional and non-conventional.

Nevertheless, Agreement 02 regulates contracts entered into as of 18 May 2017. Prior contracts are still ruled by the Agreements under which they were granted. However, the parties may submit modifications, additions, extensions, assignments and other actions related to the execution of the Contracts, to the provisions under Agreement 02, 2017.

While the ANH is empowered to enter into direct contracts with interested investors, over the past few years the ANH has developed a bidding system through bid rounds, which attempt to attract a larger number of interested parties in a more competitive environment, where economic proposals ought to be predominant. Bid rounds may, however, define particular additional conditions for certain offers as has been the case of offshore plays or unconventional reservoirs, including specific capacities to be evidenced for said bid round.

Pre-existing direct operations of Ecopetrol or Association Agreements are regulated by different regulations, due to their historic existence. Decree 1895 of 1973 was the previous technical regulation considered applicable, in line with Legislative Decree 2310 of 1974, which assigned the administration of oil and gas to Ecopetrol and its further regulation contained in Decree 743 of 1975.

On the other hand, and considering the regulation of gas supply in Colombia, Decree 2201 of 2003 must be highlighted as a mechanism seeking to promote and ensure national supply of natural gas. Aside from this particular decree, most other regulations have been contained in various resolutions issued by CREG as the regulatory body empowered to ensure operational aspects post-upstream chain:

a in 1999 Resolution 071 defined the Unique Technical Rules for the Transport of Natural Gas;

b in 2010 Resolution 126 defined general criteria for the remuneration of transport of natural gas and the General System for Charges of the National Transport System; and

c in 2015 three key resolutions, 041, 062 and 089, regulated the methodology to calculate the cost of non-exported natural gas, the income for imported natural gas in security generation scenarios, and regulated commercial aspects of the wholesale market of natural gas, respectively.

ii Regulation

The Ministry of Mines and Energy is the principal government body in charge of regulating upstream operations in oil and gas. At the contracting level in oil and gas, and other than such association agreements that Ecopetrol held as of 31 December 2003, all subsequent contractual arrangements are executed by the ANH. The ANH's powers are defined under Decree 1760 of 2003, which created the ANH, and are further developed by Decree 4137 of 2011. While in certain matters there may be doubts as to the delimitation of powers of

the Ministry and the ANH, it is clear that the fundamental regulatory powers lie with the Ministry and the ANH is merely an administrator of the non-renewable resources to be developed via TEAs or E&P contracts. As a relevant matter, in early 2013, the ANH and the Ministry executed an inter-administrative agreement that delegated to the ANH certain inspection and regulatory activities. Upon production of gas, the CREG is the specialised governmental body in charge of regulating gas transport and commercialisation. As such, CREG regulates the exercise of activities in energy and gas in order to ensure efficient energy availability and appropriate competitive structure avoiding dominant positions.

Accordingly, there are other governmental entities that have particular roles regarding oil and gas. The Ministry of the Environment is in charge of defining principles and regulations relating to environmental impacts that may be affected by oil and gas operations. Also, there are regional environmental agencies that have the right to issue regulations that must harmonise with national norms. An environmental licence is not required for all exploratory activities. For such permission, regional environmental authorities are the ones authorised to approve such permits. In contrast, when an environmental licence is required, this environmental instrument may only be granted at the state level by the ANLA in accordance with Decree 2041 of 2014, recently compiled in Decree 1076 of 2015. Thus, in certain instances, such as the case where an operator undertakes a seismic acquisition without the need to construct new roads, the operator will only be required to obtain specific environmental permits such as water concessions or discharge authorisations, which will be issued by the regional environmental agencies known as autonomous regional corporations. Moreover, Decree 1076 of 2015 compiled all the environmental applicable rules, including the provisions included in the Decree 2041 of 2014 pertaining to regulatory requirements for unconventional reservoirs and the new terms applicable for the environmental licensing processes.

In the case of offshore activities, entities such as the maritime authority DIMAR and the environmental investigations institute INVEMAR will always play a prominent role. Similarly, when prior public consultation is required in oil and gas exploration and production with indigenous or Afro-Colombian communities, the Ministry of the Interior and INCODER will be involved, issuing the applicable instruments to certify the presence or no-presence of said communities in the area of the project. However, there have been recent discussions involving the emerging communities that were not affected by the project in first instance, but as the project develops, they seem to be affected stakeholders. In this situation, when no agreement has been reached with emerging communities it can cause a major delay in operations, since the courts' position gives such communities the right of prior consultation, even though certifications of no-presence have been issued by competent authorities. The matter is addressed by the constitutional court in the Judgment T-382/06.[20]

iii Treaties

With the issuance of Law 39 in 1990,[21] Colombia became a party to the 1958 New York Convention.

20 www.corteconstitucional.gov.co/relatoria/2006/T-382-06.htm.

21 Law 39 of 1990 approved the Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) adopted by the United Nations Conference on Commercial Arbitration on 10 June 1958.

Furthermore, the recently issued Law 1563 of 2012 established a complete set of rules on national and international arbitration. The regulation clearly indicates that arbitral rulings rendered abroad can be recognised and executed in Colombia in accordance with the applicable regulations.

Among the various commercial treaties recently entered into by Colombia and those that intend to further commercial relations, there have been many free trade agreements negotiated in the past few years. These treaties include:

a the Free Trade Agreement between Colombia and Peru and the European Union and its Member States as approved by Law 1669 of 2013;

b the Free Trade Agreement between Mexico and Colombia as approved by Law 1457 of 2011;

c the Free Trade Agreement between Canada and Colombia as approved by Law 1363 of 2009; and

d the Free Trade Agreement between Colombia and the United States of America as approved by Law 1143 of 2007.

In addition, Colombia has entered into various bilateral investment treaties, including but not limited to, Peru, Switzerland, China, Spain and Japan.

To date Colombia has entered into double taxation treaties with Argentina, Brazil, Canada, Chile, the Czech Republic, France, Germany, Italy, India, South Korea, Mexico, Portugal, Spain, the United States, Venezuela and the member states of the Andean Pact Community, and it is seeking to increase the jurisdictions with which it has these types of arrangements.

iv Licensing

Colombia has three types of underlying agreements that grant title to the exploration and production of oil and gas. These contractual structures are the association agreement, which remains in force between Ecopetrol and such parties with which it had entered into or renewed a contract prior to the end of 2003, and the TEA and E&P contracts as executed by interested qualified parties with the ANH. Access to association agreements may only be done via Ecopetrol on the basis of its grandfathered rights. Access to TEAs or E&Ps is typically done via public open competitive mechanisms. These require public invitation, prior qualification of proponents and the ANH objectively selecting on the basis of offers, specific terms of reference of the corresponding bid round and Agreement 02 of 2017. However, note must be made that this Agreement determines that contracts subscribed before Agreement 02 was issued will be regulated under Agreements in place at the date of their execution. Aside from the open competitive mechanism there is the competitive closed procedure and the direct allocation. The first is based on an invitation to a specific set of proponents or contractors that *ex ante* meet the conditions expected by the ANH and again the ANH selects the winning bid from the select group based on offers, the specific terms of reference of the corresponding bid round and Agreement 02, 2017 or that Agreement applicable at the execution time. In the latter scenario, direct negotiation is always considered an exceptional process subject to the approval of the ANH board of directors, requiring express conditions to undertake this type of process, by invitation or contractor proposal and subject to Agreement 02 of 2017.

In accordance with Agreement 02 of 2017, interested parties must meet the five minimum capacity requirements: legal; financial; technical-operational; environmental; and social responsibility. Legal capacity can include time of existence and corporate purpose

definition. Financial capacity relates to the economic solvency that an investor is expected to have in order to comply with its obligations under the corresponding agreement. The technical and operational capacity of the proponent is tied to production and reserves of proponent, including the technical team available to undertake the proposed contractual commitments. The environmental capacity refers to a set of principles, rules and best practices to which the proponent commits and is credited with having. Lastly, there is the social responsibility component, which includes work ethics, respect of the state, workers and community, and a social licence to operate, including past practices and best practices that the proponent can effectively demonstrate to have set in place in its organisation.

Exploration and production contracts as state contractual concessions have an exploration period of two to nine years and a production period of 24 to 30 years, according to Agreement 02, 2017. Each period is divided into specific phases with specific work commitments in turn composed of a compulsory programme and an additional programme that the proponent will have typically offered, and both terms may be extended provided certain conditions are met under the contract.

It is important to note that capacities to be evidenced by proponents for unconventional reservoirs are provided under Agreement 02, 2017. Under this Agreement, production, reserves and economic solvency capacities are different from those provided for conventional resources.

As per the economic rights under E&P contracts, they will include royalties based on percentages varying from 8 to 25 per cent of production calculated per field.[22] In addition further payments may be triggered when field production exceeds 5 million barrels and the West Texas Intermediate has varied in relation to predefined indexes. Similarly, subsurface rights are to be paid during exploration and the ANH will expect social investments and technology transfer fees under the underlying agreements.

Breach of the underlying agreement can fundamentally be triggered by a failure to comply with economic obligations, timing requirements or work programme commitments.

III PRODUCTION RESTRICTIONS

Colombian regulations do not limit the terms of production of oil and gas. On the contrary, rules seek to restrict loss of product, to ensure maximum production. In turn, the ANH receives the royalties required of the contractor, which can also be paid in kind. The contractor holds the rights to production after the payment of royalties and can dispose of hydrocarbons in the local or international market. High fees may apply in certain instances, but this in itself does not restrict production. Refining can require (as is also the case of gas required for domestic supply)[23] that contractors comply with the preferential duty to supply local markets. A further rule is found under the Petroleum Code, which indicates that in the event that the royalties received by the government are insufficient to supply local requirements of oil derivatives, at the government's request, contractors will be obliged to offer for sale a quantity that, when added to the royalty, does not exceed 50 per cent of the total production.

22 Article 16 of Law 756 of 2002. Note that unconventional reservoirs under Law 1530 of 2012 have a benefit equivalent to 40 per cent reduction in the tariff applicable to conventional resources. The ANH defined the methodology for liquidation of royalties for oil and gas during 2013 in Resolutions 411 and 412 of 2013, respectively.

23 Reference can be made to Decree 1073 of 2015.

IV ASSIGNMENTS OF INTERESTS

Limitations to assignment of interest are in turn restricted to complying with the same conditions and capacities that allowed the assignor to acquire the corresponding participating interest or any condition as operator of record. No preferential right exists in relation to the government but the ANH must approve all transfers in advance. Certain recent regulatory developments require antitrust filings when certain thresholds are met and when competition restriction is evident. To the extent that capacity conditions are met by the assignee, assignment should generally take place. However it must be highlighted that guarantees in place for the compliance of obligations under contract must be renewed or provided new by assignee, especially to comply with exploration work programmes. Assignments have taken more time than expected to be processed by the ANH and farmees and farmers should provide for this particular situation in their contractual arrangements. When assigning interests, particular attention should also be given to timing with assignment of environmental licences and permits.

V TAX

Operators undertaking onshore activities in Colombia will be fully taxed as any other Colombian national. However, and as an incentive seeking the promotion of offshore oil and gas activities, the Colombian Ministry of Trade, Industry and Tourism and the Ministry of Finance issued Decree 2147 of 2016, which allows the declaration of permanent offshore free trade zones. In a nutshell, the free trade zones regime allows companies operating offshore to benefit from a significant tax reduction[24] and a more favourable customs regime. Finally, the Petroleum Code sets forth that municipal and department taxes shall not apply to the exploration and production of oil and its transport as well as in the construction of refineries or pipelines.

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

a corporate income tax (CIT): 33 per cent tariff;

b corporate income tax surtax: 4 per cent tariff for 2018. The corporate income tax 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 = 37 per cent, and as of fiscal year 2019 and following it will be 33 per cent;

c industry and commerce tax ICA: ICA taxable event is 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. 100 per cent of the ICA paid is deductible for income tax purposes;

d bank debit tax: Currently Colombia has in place a bank debit tax. This tax is withheld by the financial authorities and has a taxable base of 4 per mille applicable on any withdrawal or transfer made from savings and checking accounts. 100 per cent of the paid tax is deductible for income tax purposes;

24 CIT tariff: 20 per cent and an exemption from payment of import duties and taxes on the entry of goods, such as raw materials, packaging material and machinery, from the rest of the world to the free zone.

e VAT: All goods and services purchased locally are subject to a standard rate is of 19 per cent. The standard rate applies to all supplies of goods or services, unless a specific provision allows an exclusion from VAT or the application of a reduced rate; and

g royalties.

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

Tax	Definition – scope	Level	Tariff (per cent)
Income tax	The remuneration of the factors of production, all net income, that increase the equity*	National	33
Income tax surtax	Established in 2018, the surtax is a tax surcharge for the income tax	National	4 (2018)
Industry and commerce	The remuneration generated from service, industrial and commercial activities carried out in the municipality.	Regional	Between 0.2 and 1.2
Bank debit tax	Any withdraw or transfer made from savings and/or checking accounts	National	0.4
VAT	All goods and services purchased locally	National	19
* Foreign companies that do not have a permanent establishment in Colombia should pay income tax of 40 per cent.			

VI ENVIRONMENTAL IMPACT AND DECOMMISSIONING

In accordance with applicable regulations, only listed oil and gas exploration and production activities are required to hold a prior environmental licence.[25] Furthermore, only the ANLA is competent to permit oil and gas exploration and production when an environmental licence is required. Activities not requiring an environmental licence may require local environmental permits associated with the use of specific natural resources on a case-by-case basis. Operators must carefully review restrictions on operations derived from the classification of protected or excluded areas, zoning regulations and the growing number of basin management plans and programmes. Under Colombian law environmental authorisations are not considered acquired rights and may suffer modifications or limitations throughout the course of a project.

Environmental licences are composed of the environmental impact assessment, the environmental management plans, the contingency plan and the abandonment and decommissioning plan. Operators are required to provide guarantees ensuring that decommissioning will be appropriately carried out. This is a requirement both under environmental laws and under the underlying agreements. Accordingly, for decommissioning purposes in underlying agreements, contractors are obliged to establish a decommissioning fund to guarantee availability of resources to develop the decommissioning programme. Such fund may be done through any economic instrument approved by the ANH (i.e., trusts, bank guarantee). Said provision is mainly determined under contract, were ANH determines conditions of decommissioning fund.

25 Law 99 of 1993 as regulated by Decree 2820 of 2010.

VII FOREIGN INVESTMENT CONSIDERATIONS

i Establishment

Foreign nationals are granted the same civil rights as Colombians.[26] Other than limitations under the Constitution or other laws, foreign nationals in Colombian territory are granted the same guarantees that Colombians have.[27]

Foreign companies wanting to undertake oil and gas exploration and production in Colombia must set up a branch duly recognised for such purpose.[28] Of particular interest is the fact that Law 10 of 1961 extended this same obligation to foreign service providers in the oil and gas sector.[29]

In lieu of establishing a branch, foreign investors may, of course, incorporate a subsidiary. The timing required for the incorporation of a subsidiary or a branch office is generally similar. Other than for legalisation of documents required to be processed locally for registration purposes, most of the time required to initiate operations is associated with the Ministry of Energy and *ex post* recognition that all criteria have been effectively met. While not a sophisticated procedure, it may take two to three months to start the two-to-three-week process to establish the branch or incorporate the subsidiary.

ii Capital, labour and content restrictions

No minimum capital requirements are necessary for the branch or the subsidiary. Evidently, contractual requirements will ultimately require minimum work programme obligations to be met. Exchange regulations fully protect foreign investment and in the case of oil and gas, E&P operators may access the special exchange regime that allows parties to make and receive payments in a foreign currency. Foreign investors must, however, strictly follow applicable exchange regulations to avoid fines ranging up to 200 per cent of the value of the invested or channelled amounts.

No limitations exist in Colombia as to the hiring of foreign nationals, apart from visa and regulatory requirements that have to be met. However, it is important to consider that the underlying agreements and environmental licence will typically promote contracting local labour to the extent available at this level. Decree 2089 of 2014 set forth specific conditions requiring that local labour be preferred for unqualified labour in field operations.

iii Anti-corruption

Colombian oil and gas practice had led to increased knowledge of FCPA rules as well as the UK Bribery Act. In line with these international regulations and seeking to restrict any issues of corruption to the furthest extent possible, Congress issued Law 1474 of 2011, which has become the anti-corruption codex. Similarly, and even before this regulation had been issued, Law 412 of 1997 had already approved the Inter-American Convention against Corruption.

26 Article 100 of the Colombian Political Constitution.

27 ibidem.

28 Article 10 of Decree 1056 of 1953.

29 Article 3 of Law 10 of 1961.

VIII CURRENT DEVELOPMENTS

The election of Ivan Duque as president of Colombia for the following four years presents an encouraging scenario for the hydrocarbons industry. President Duque is a supporter of an increase in the exploration of offshore hydrocarbons. Another of his proposals is the evaluation of possibility of exploitation in desert areas, sparsely populated or without population and without bodies of water, and in more populated areas to seek consensus between companies, the government and communities.[30] Additionally, he has pronounced on several occasions regarding the need for legal security for the investor, proposing the: (1) limitation to the *tutela* constitutional action in order to prevent its abuse; (2) unification of rulings issued by the highest courts; and (3) regulation for popular consultations regarding projects of national interest, such as hydrocarbons and mining.

It is also important to analyse and consider the different implications and effects that the implementation of the peace agreement will have in relation to the hydrocarbons sector.

One cannot affirm that with the signing of the peace agreement, there will be an automatic improvement and growth of the hydrocarbons sector in Colombia, since it is considered the first step in a long process that requires close cooperation between the government and the oil and gas companies to stimulate the sector, which is still deeply influenced by the fall in oil prices.

It is worth mentioning that, despite the fact that in the peace agreement there is no explicit reference to the hydrocarbons sector, it is possible to highlight implications for this sector. To this effect, it is worth noting that the ANH determined that the number of blocks for oil and gas exploration and production will increase in coming years with the signing of the peace agreement. Also the new strategy of the Ministry of Mines, in association with the ANH, seeks to extend territorial peace by reaching social agreements between the local communities and the hydrocarbons sector, in order to reduce the strain on stakeholder relationships and thus promote peace.

With the favourable conclusion of the peace process, Colombia is facing a great variety of possibilities and opportunities that must be regarded as advantages that include new possibilities and opportunities for the recovery of the hydrocarbons sector in Colombia, which can have an important impulse as a consequence of the peace agreement achieved by the government, but recognising also that it is just one step of many required for the oil and gas industry to take off again in the country.

Besides that, two additional considerations must be made: (1) a new offshore contract was issued that aims for the development of new hydrocarbons blocks in Colombian oceans (this contract has an arbitral clause favourable to investors); and (2) a modification to Agreement 2 of 2017 is foreseen to grant greater flexibility to the contractor in relation to the modification of the contractual terms, based on its investments.

30 http://www.portafolio.co/economia/las-propuestas-que-mas-separan-a-duque-y-petro-518102.

Appendix 1

ABOUT THE AUTHORS

JOSÉ V ZAPATA LUGO

Holland & Knight

Equity partner at Holland & Knight in Bogotá, Mr Zapata has been recognised as one of the lawyers with the highest level of expertise in oil and gas, mining and environmental matters in Colombia. Similarly, he is one of the most recognised lawyers in projects and negotiations in the mining and oil and gas sectors, both 'upstream' and 'downstream' throughout Latin America. With over 20 years' experience in natural resources, he has been officer and legal representative of various oil and gas, mining and environmental corporations, as well as serving as president of Columbus Energy Sucursal Colombia, a leading venture company successfully set up in Colombia with 11 blocks in the Llanos and Putumayo basins in Colombia covering nearly 1 million acres, which during 2008 drilled 11 wells resulting in a 91 per cent success rate and the addition of over 2,800bbl/d of net production.

Similarly, Mr Zapata has been legal counsel in the structuring of foreign investment transactions, mergers and acquisitions, as well as reorganisation of corporations in Colombia. Mr Zapata has been member of various boards of directors of multinational corporations in the automotive, energy, telecommunications, industrial and food sectors. He is a professor at the Javeriana, Rosario and Externado de Colombia Universities for environmental, oil and gas, corporate responsibility, environmental liability and sustainable development. Mr Zapata graduated from Universidad Javeriana and holds an LLM from McGill University.

CLARO MANUEL COTES RICCIULLI

Holland & Knight

Claro M Cotes R is an associate in Holland & Knight's Bogotá office. He practises in the area of oil and gas, mining, environmental, corporate and M&A as well as litigation and dispute resolution. Mr Cotes primarily represents oil and gas and mining companies as well as other types of corporations. He advises clients on contracting, due diligence, and mergers and acquisition matters, and also has experience with litigation. Mr Cotes graduated from Universidad Javeriana and holds an LLM from Dundee University.

HOLLAND & KNIGHT
Edificio Avenida Chile
Carrera 7 #71-21
Torre A, Piso 8
Bogotá
Colombia
Tel: +57 1 745 5720
Fax: +57 1 541 5417
jose.zapata@hklaw.com
claro.cotes@hklaw.com
www.hklaw.com

ISBN 978-1-912228-65-2