



Mining

The regulation of exploration and extraction in 31 jurisdictions worldwide

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Chile

Rafael Vergara and Juan F Mackenna

Carey y Cía

Mining industry

1 What is the nature and importance of the mining industry?

The mining industry accounts for 15.5 per cent of the GDP and 58.1 per cent of Chile's total exports (US\$30.4 billion). Chile is the largest producer of copper (36 per cent) and molybdenum (31 per cent) in the world market. Chile also produces other metals, such as silver and gold, and many non-metallic substances.

The mining industry is mainly owned by private foreign and national companies. State-owned companies represented 26 per cent of the metals industry in 2009.

Legal and regulatory structure

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

The legal system is civil law-based.

3 How is the mining industry regulated?

At state level, the industry is regulated by means of certain provisions in the Political Constitution (PC), specific mining laws – the Constitutional Organic Mining Law (COM) and the Mining Code (MC) – and other general and special regulations. There are no special mining agreements (contracts) with the state.

4 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws?

The PC provides that the state is the owner of all mines although any individual or entity may apply for a mining concession to explore and exploit the mines. Ownership of mines and concessions are different from that of the surface land, which may be subject to obligations and limitations to facilitate mining exploration and exploitation activities.

The COM regulates the concession and establishes that all metallic and non-metallic substances may be subject to concessions, except for oil and gas deposits, lithium, and deposits of any kind located in the sea bottom under Chilean jurisdiction or in areas deemed, by law, to be important to national security. These non-claimable mineral substances may be mined by the state or state-owned companies or under administrative concessions or special operational contracts, all of them governed by their own legal statute.

The MC elaborates on the provisions of the PC and the COM.

Chilean civil courts are the only entities that can receive the application for a concession, grant it and declare it terminated or extinguished. They also resolve all situations and conflicts related to concessions.

The National Geology and Mining Service (Sernageomin) is the governmental entity within the Ministry of Mining that approves the technical requirements related to the form, boundaries and location of concessions; it keeps a public record of concessions; and supervises the technical compliance with certain mining regulations.

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

Chile does not yet have a binding legal code for reporting mineral resources and reserves. Nonetheless, a code prepared by the Chilean Institute of Mining Engineers and other entities, such as the Chilean Securities and Exchange Commission, together with representatives of the private sector; and sponsored by the Ministry of Mining, was issued in December 2003 (the code). This code is based on the Australian JORC system and has been recognised by CRIRSCO. Law 20,235 of 31 December 2007 authorises the creation of a commission that is in charge of approving this code (whereby it will be legally binding), together with some other tools to create a Chilean venture capital market for the mining business.

Under the code, mineral resources are defined as a concentration or occurrence of natural, solid, non-organic or organic fossilised terrestrial material in such form, quality and quantity that there is a reasonable assessment about its technical-economic potential. The location, tonnage, contents, geological characteristics and the grade of continuity of the mineralisation is estimated, known or interpreted from specific geological, metallurgical and technological evidence. Mineral resources are classified, in order of increasing geological confidence, into inferred, indicated and measured.

Also under the code, mineral reserve is defined as the economically mineable part of a measured or indicated resource in accordance with a productive, environmental, economical and financial scenario derived from a mining plan. The mineral reserve includes losses and dilutions with material surrounding part of the resource, which is contaminated as an effect of the mining. The assessment can come from pre-feasibility or feasibility studies where realistic conditions, at the time of the assessment, include geological, metallurgical geotechnical, environmental, social and governmental factors. These assessments must demonstrate the technical, economic, extractive and sequential feasibility at the time that they are reported. Mineral reserves are classified in order of increasing confidence into probable and proved.

Mining rights and title

6 Who has title to metallic minerals in the ground?

The owner of a concession has the exclusive right either to explore, in the case of an exploration concession, or to explore, exploit and acquire, in the case of an exploitation concession, the metallic minerals found within the boundaries of his or her concession. Concessions are immovable property. In addition, see question 4.

7 What information and data is publicly available to private parties that wish to engage in mining activities?

There is a Public Record of Concessions (including information on their location) and certain geological data, managed by Sernageomin. Mining statistics are available from the Chilean Copper Commission

(COCHILCO). There is also a Directory of Mining Companies in EDITEC.

- 8 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have?

The right to explore or exploit a designated area and acquire concessions through a non-discretionary judicial procedure explained below is on a first-come, first-served basis. Concessions can be freely assigned or transferred, mortgaged and, in general, be subject to any legal contract.

A concession ownership right can be enforced against the state or any other third party.

Exploration concessions last two years unless an extension is requested prior to expiration for a maximum of two additional years, together with waiving half of the area allocated. While an exploration concession is in force, its holder is the only one who can file for an exploitation concession in the same area.

Exploitation concessions are granted for an indefinite time.

The owner of a concession has the following additional rights and obligations.

Rights

- To occupy as much of the surface land as necessary for the exploration or exploitation works, upon payment of the proper indemnity for damages to the surface landowner.
- To impose easements upon an unwilling surface landowner through a simple and summary procedure before the relevant civil court (certain exceptions apply in the case of houses and their appurtenances and lands where vineyards and fruit trees are planted).

Obligations

- To pay (during March of each year) an annual licence or permit for a cost equivalent to approximately US\$1.5 per hectare, in the case of exploration concessions, and US\$7.5 per hectare, in the case of exploitation concessions. Failure to pay any annual permit may cause the loss of title to the concession through an auction procedure.
- To obtain the necessary environmental approvals.
- To comply with:
 - health and safety protection rules;
 - rules regarding civil construction developments, mining work, machinery, equipment, tools, buildings and mining facilities; and
 - special environmental authorisations (fines, closure and even termination of mining activities may apply in case of infraction of such obligations).
- To comply with, or be subject to, the general rules of contracts and torts in connection with their liability in case of infractions or violations of Chilean civil law.

- 9 Is there any distinction between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

There are no restrictions on foreigners owning mining rights. Nevertheless, there is some doctrinal discussion as to whether Decree Law 1939 of 1979, which prohibits the nationals of bordering countries acquiring border real estate, is also applicable to concessions.

No domestic partner is required.

- 10 How are mining rights protected?

The PC grants protection, as a constitutional right, to property rights to concessions. There is an independent judicial system that adheres to the rule of law and due process.

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

There is no restriction against constituting concessions on indigenous lands. This notwithstanding, the Indigenous Law No. 19,253 of 1993 requires prior approval of the Indigenous Development National Corporation (CONADI) to impose a lien (eg, an easement) on indigenous land (such authorisation is granted in most cases).

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

Private parties may acquire any kind of surface rights (ownership, easements, leases, etc) through direct negotiations with the surface landowner.

Private parties may judicially impose easements to facilitate the convenient exploration or exploitation of their concessions provided damages are paid.

Duties, royalties and taxes

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

Taxes

Tax provisions affect mining operations differently depending on the scale and volume of the mining industry. Small mining companies are subject to an overall income tax at a rate fixed according to a formula that takes into account the price of the ore and the sales of the company during the past year. Mid-sized mining companies are taxed on a presumptive basis, which is fixed based on the annual net sales and the price of the ore. Large mining companies' taxes are assessed according to the normal rates of the Income Tax Law.

In relation to large mining companies, the Income Tax Law provides that the profits of foreign corporations, limited liability companies and affiliated companies may be levied at the time the income is earned or when profits are distributed to shareholders. The corporate income tax rate, paid by all companies, is 17 per cent (called 'first category tax'). There is a 35 per cent tax (called 'additional tax') on dividends or profit remittances to non-Chilean shareholders. The aforesaid 17 per cent can be deducted as a credit from the additional tax. Individuals resident or domiciled in Chile pay personal income taxes (called 'second category tax') on their work-related income and an overall surtax on other types of income on a progressive rate schedule from zero per cent to 40 per cent. Non-resident individuals and entities are subject to gross withholding taxes on Chilean-sourced income and on certain remittances that may technically not constitute income sourced in Chile. For tax purposes, 'taxable income' is defined and may include capital gains.

Most companies are required to pay first category tax on their annual accrued net taxable income. If the income is not invested in the company but instead paid out (dividends, partner withdrawals or, in the case of a branch, remitted abroad to the head office), it is then taxed again in the hands of the recipients. Double taxation of shareholders is eliminated through an integration system based on a credit method, under which the first category tax can be fully credited against the shareholder level tax. Profit distributions among Chilean resident entities are not subject to tax.

Royalties

The 'mining royalty' or 'specific mining tax' became law on 16 June 2005 and entered into effect on 1 January 2006. It is structured as an income tax on the 'taxable operating income' from mining activities.

Any individual or legal entity who extracts minerals of a type that could be subject to a mining concession, and who sells such minerals in any state of production, is subject to the tax on his or

her 'taxable operating income'. This is defined as net income determined for corporate tax purposes, with some adjustments such as: elimination of gross receipts that are not directly connected to the sale of mining products; inclusion of any costs and expenses that are not directly connected to the sale of mining products, and inclusion of interest charges, loss carryovers, and expenses related to the acquisition of a right to exploit a mine owned by a third party (lease, usufruct, etc).

The specific mining tax rate is progressive, based on the taxpayer's gross sales of minerals with a rate schedule from 0 to 4.5 per cent, although mining taxpayers with gross sales of minerals greater than a certain threshold are subject to a 5 per cent flat tax rate (currently US\$350 million, approximately).

The bill also modified Chile's Foreign Investment Statute (DL 600). It added a new article to such statute (article 11-ter), which provides that mining investments of US\$50 million or more may, for 15 years as from commencement of commercial production, claim the invariability of the specific mining tax, including its rate and tax base and the future imposition of any other tax assessed on income from mining activities, including royalties or similar charges, and the mining licence rate and method of determination. The mining tax invariability is incompatible with the income tax invariability rights afforded to foreign investors under other DL 600 provisions.

Foreign investors who have a foreign investment contract stipulating income tax invariability executed before December 2004 will not be subject to the new mining tax until their right to invariability expires. However, they had the option to choose the new mining tax stability by waiving, prior to December 2005, their income tax stability rights. If such a choice was made, the new mining tax stability was afforded to them for 12 years. In addition, by choosing the mining tax stability, such foreign investors did not lose their accelerated depreciation regime before 2008, benefited from a reduced mining tax rate of 4 per cent, and during 2006 and 2007 enjoyed a credit against income taxes equal to 50 per cent of the mining tax (excess credits being deductible as an expense).

An amendment introduced in 2006 provides the option to waive the use of accelerated depreciation in exchange for permitting the deduction of interest expenses on related party debt not exceeding three times the equity of the company. The decision should have been taken before 30 June 2006.

Duties

No special duties apply. As a general rule, Chile applies a flat 6 per cent custom duty on imports of all merchandise, which is calculated on the CIF value of the merchandise, unless this is found to be below fair market conditions by the Chilean Customs Service. Nevertheless, Chile has entered into free-trade agreements whereby the import duty is reduced for most merchandise produced in the other state.

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

Under DL 600, an investor may agree, alternatively, to the mining-tax invariability (article 11-ter) mentioned above; or to an overall fixed income tax rate of 42 per cent for a term of 10 years from beginning commercial production, instead of the normal tax rate as per the Income Tax Law, which is currently 35 per cent. This rate can be extended to up to 20 years for mining projects over US\$50 million.

Additionally, under DL 600, foreign investors are entitled to be treated in the same manner as a local investor and, in some cases, to the freezing of custom duties and value-added tax (VAT).

A special tax regime has been established for mining and other industrial activities conducted in the extreme northern and southern regions of the country.

Other incentives include:

- in certain cases, accelerated depreciation of fixed assets to one-third of their normal life;
- deferred payment (from one to seven years) of customs duties on the import of certain capital goods; and
- the possibility for VAT taxpayers and exporters, in certain cases and under certain circumstances, to recover in cash accumulated VAT credits.

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

See question 13.

Business structures

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

Most foreign investors set up a stock company or corporation, a limited liability partnership or a branch office in Chile. It is also possible to organise stock companies, which are characterised by their flexibility both in incorporation and the determination of their provisions, giving more importance to the parties' agreements. There are also companies governed by the Mining Code, the most common of which is the contractual mining company, created by public deed with at least two partners.

Financing

17 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?

Project finance is the main source of financing for large-scale mining projects. Local commercial or syndicated loans are the source of financing or refinancing for mid-sized or small-scale mining projects. Although there are some mining companies on the stock market, to date, the stock market does not play a significant role in the financing of the Chilean mining industry. The bond market is also a good available alternative, though only a couple of mining entities have issued bonds, either domestically or internationally. Ultimately, the purchase of a royalty associated with future production of a mine and the *avío*, a similar contract to the above, have appeared as alternatives to finance.

Restrictions and limitations

18 What restrictions and limitations are imposed on the importation of machinery and equipment or services required in connection with mining activities?

There are no specific limitations. All merchandise can be imported into Chile, with certain exceptions.

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

General rules apply: no less than 85 per cent of the workers of one given employer with more than 25 employees must be Chilean, though certain exceptions may apply in calculating the number of Chilean workers. General immigration rules also apply: foreign workers are required to obtain work visas to work in Chile and individual employment contracts of foreigners must include certain mandatory clauses.

20 What restrictions or limitations are imposed on the processing, export or sale of metallic minerals?

There are no restrictions other than the one established by Law No. 16,624, which requires copper producers (over 75,000 tons per year) to reserve or stock a percentage of their production for consumption

Update and trends

In January 2010, new legislation was published amending some environmental rules, reformulating the entities involved in the area and creating new ones, such as the Ministry of the Environment, the Environmental Assessment Service and the Superintendence of the Environment. They will not enter into effect until certain regulations are in place, which are still pending.

During May 2010, the government sent to Congress proposed legislation to raise funds for the February earthquake reconstruction efforts. Among the different proposal, the government has proposed some changes to the specific mining tax. The most significant

changes would affect taxpayers with gross sales of minerals of more than approximately US\$350 million. These changes would not apply to certain foreign investors that have opted for the invariability of the specific mining tax. However, these investors may opt to be subject to these changes only for 2010 and 2011, after which the old regime would apply again until when their original invariability expires, in exchange for an additional eight-year invariability for the modified system. It is anticipated that Congress will approve this proposed legislation without making major changes to the government's bill.

by the national industry. The amounts of copper to be reserved are determined by the COCHILCO.

- 21** What restrictions or limitations are imposed on the import of funds for mining activities or the use of the proceeds from the export or sale of metallic minerals?

Funds must be imported to Chile through a member of the formal exchange market (FEM) formed by all commercial banks, certain exchange houses, stock brokers and some entities authorised by the Central Bank. The investment of capital in Chile and the repatriation of an investment and its profits must be done either under chapter XIV of the Compendium of Foreign Exchange Regulations of the Central Bank of Chile or under DL 600. The first procedure is a mere registration of the investment with the Central Bank and it is available to individuals or legal entities irrespective of their domicile or residence and does not convey a prior approval. DL 600 offers investors the opportunity to enter into an agreement with the Republic of Chile to bring foreign capital into the country under terms that are guaranteed not to change, and it is available to individuals or legal entities domiciled or resident abroad investing more than US\$5 million. In regard to mining projects, as long as the companies fulfil certain specific requirements, the length of the agreement can be longer.

Exporters may choose either to bring the foreign currency resulting from an export transaction into Chile or to maintain such foreign currency abroad by making investments, paying import operations or foreign loans. If an exporter chooses to bring the foreign currency into Chile, there is no obligation to bring the foreign currency into the country through the FEM nor to convert it into Chilean pesos.

The applicable regulations provide for compliance with certain reporting requirements regarding the outcome of the relevant export and the use of the foreign currency.

Environment, health and safety

- 22** What are the principal environmental, health and safety laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The PC guarantees all persons the right to live in a clean environment and it establishes that the law may determine specific restrictions in exercising particular rights and privileges in order to protect the environment.

Law No. 19,300 of 1994 is the most important environmental legal statute. Together with its regulations (ie, Executive Decree No. 95 of 2001), it sets down the legal framework, including the environmental impact assessment system (EIAS).

The specific mining environmental regulations can be classified into those related to air emissions, waterworks, industrial liquid and solid waste, household waste, hazardous substances and wastes, explosives, anthropological, archaeological, historical or cultural heritage, land use, flora, fauna, wildlife-protected areas including glaciers, road construction and occupational health and safety.

The most important regulation regarding mining safety and health is Executive Decree No. 132 of 2004, which contains many specific obligations for mining companies in regard to mining works, machinery, equipment, tools, buildings and mining facilities. Supplementary Executive Decree No. 594 of 2000 regulates the sanitary conditions in every workplace (noise, hazardous substances management, ventilation, industrial, hazardous and household waste, etc), including mining activities.

The principal regulatory authorities are the National Environmental Commission (CONAMA), the Regional Office (SEREMI) of the Health Ministry and Sernageomin.

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

The holder of a mining project must submit the environmental assessment of the project to CONAMA through an environmental impact study (EIA) or an environmental impact statement (DIA), depending on environmental impacts.

The EIA concludes with a favourable environmental resolution or the denial of the project. The environmental impact procedure must finish in 120 or 180 business days, in the case of an EIA, or 60 or 90 business days, in the case of a DIA. Usually, this takes longer if the authority begins consultations regarding the project or the project holder asks for a suspension of the procedure. In the case of an EIA the project is considered approved if there is no formal decision in that period.

Almost all other environmental mining permits are obtained once the environmental resolution is filed because the competent authorities (other than CONAMA) require CONAMA's approval to file the environmental permits. The favourable environmental resolution obliges all public agencies to issue all exclusively environmental authorisations and, on the contrary, if the decision is negative, those same agencies must deny them.

The whole environmental permit process may take approximately 15 months.

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

A closure plan must be presented together with the presentation of the exploitation method, or any major change to it, to Sernageomin, which has 60 days to answer the request. They must be updated every five years to be adapted to the mining reality that may have changed over time. Nonetheless, if Sernageomin determines, at any time, that the approved closure plan does not guarantee compliance with the law, due to changes in the operation of the mining project, a new closure plan must be filed.

There is no obligation to submit performance bonds, guarantees or any other financial assurances.

International treaties

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

Chile has signed agreements for the promotion and protection of investments with many countries throughout the world. It is a member of the WTO, it signed the Kyoto Protocol, the Washington Convention, the Stockholm Convention, and it has a mining treaty with Argentina. Chile has also signed many double taxation treaties (Canada, Mexico, Spain, Norway, South Korea, etc) and free-trade agreements (Canada, the United States, the European Union, Mexico, South Korea, New Zealand, Singapore, Brunei and China).



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