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Mining in Latin America

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The recovery of the worldwide economy from the crisis of 2008 was especially rapid in the case of the prices of base metals and commodity minerals. Accordingly, senior and mid-sized mining companies also recovered their stock market value and the junior companies are beginning to again obtain resources from the public. Latin America has also benefited from these facts and continues to be a very important target of many of such mining companies.

Thus, 25 per cent in 2008 and 26 per cent in 2009 of the world's total investment in non-ferrous exploration were spent in Latin America, keeping its position from 1994, as "the most popular exploration destination" (source: Metals Economics Group). The region continues to have unexplored territories. New high-grade deposits are being discovered and new resources and reserves are being identified in the mines under exploitation. As most of the projects that were frozen in 2008 to 2009 are back on track, the investment in production is as relevant as it was in the recent past, attracting around a quarter of world investment.

Latin America is still an important base for the world supply of metals and a substantial global mineral reserve. Regional production includes 48 per cent of all copper, 48 per cent of all silver, 32 per cent of all molybdenum, 20 per cent of all iron, 20 per cent of all zinc and 16 per cent of all gold.

Mining continues to be significant to the economies in the region, especially in Mexico, Peru and Chile and is gaining more importance every day in Brazil, as well as in Argentina. In Chile, for example, the mining sector represented 15.5 per cent of GDP in 2009. Investment in mining continues to come largely from outside of the region, especially from Canada, USA, UK and Australia, and not only from large companies but from junior companies as well, particularly in exploration. Lastly, some investments from China, including the purchase of mines and companies, and old players from Japan, are being seen in the regional scenario. In addition to the above, regional private mining companies – like Grupo Mexico and Peñoles in Mexico, Buenaventura and Brescia in Peru, and Luksic in Chile – have also grown and expanded internationally. While production is largely privately held, regional government-owned metal mining companies, like Vale in Brazil and Codelco in Chile, have also become stronger, with expansions not only in the region but also abroad.

But not everything is so good with the rising mineral commodities' prices for the mining companies. With the increase of their revenues, several governments in the region are trying to get a bigger share of such revenues, through creeping increase of windfall taxes or royalties. Additionally, the contribution made by the mining industry to each country, through the creation of work places, infrastructure and payment of general taxes, are sometimes either not recognised, or perceived as not enough by the people and accordingly, some governments have made eco of them. And that, in spite of the efforts made by the companies, especially during the last years, when they have executed direct agreements with the local communities whereby the companies have committed investments in infrastructure, education or health, use local goods or services or to train and employ local work force. Sometimes, the companies have made additional direct contributions focused in certain specific social areas of such communities, either under a shared administration or trust, with a long-term view to strengthen their relationship with the local people and their environment.

Legal title to a mining deposit and to key supplies (such as water), availability of the required economic resources, or even technological capabilities, are no longer sufficient. Instead, the need of what has been called "social licence" has arisen, an approval by human communities having some geographic, ancestral, cultural or other relationship with the place where the project is located.

In addition to these social issues, environmental factors have become significantly more crucial. The appropriate management of social and environmental issues (S&E) is part of what initially was called sustainable development and currently known as "corporate social responsibility". The stated objective of this concept is that enterprises appropriately balance economic performance, social development and respect for the environment, or "the three P's", namely, profit, people and the planet.

The growing importance of S&E in the development of mining projects in Latin America is proving to be a major challenge. Nowadays, special attention should be taken on the following matters: indigenous and tribal people claims; the protection of natural areas; and the scarcity of water.

Indigenour and Tribal People's Rights

The relatively recent approval of the 169 Convention on Tribal and Indigenous Peoples in Independent Countries (the "Convention") by the International Labor Organization is the milestone that has given a definitive impulse to the legal recognition of indigenous and tribal people's rights. Currently, more than half of the countries that have ratified the Convention are from Latin America, namely: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Honduras, México, Paraguay, Peru and Venezuela.

The Convention contemplates a consultation and participation process whereby indigenous peoples are entitled to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.

Specifically, this process is composed of two main obligations for governments (article 6 of the Convention); the consultation of indigenous peoples whenever consideration is being given to legislative or administrative measures which may affect them directly; and to establish means by which indigenous peoples can freely participate at all levels of decision-making in the elaboration and implementation of policies and programmes that may concern them.

The Convention also establishes the rights of the people to the natural resources, to consultation before carrying out or approving a project, if and to the extent the peoples may be affected by such project; and to benefit from the projects which exploit the natural resources and to participate in the utilisation, administration and conservation of such resources. The hurdles that mining projects may face due to the application of the Convention and that consequently may affect their financing lay in the ambiguity of their terms and binding force.

First, the application of the Convention is by itself an issue of relevance. There are some countries like Chile, Colombia and Bolivia where the consultation and participation provisions are self-executive, which means they can be directly applied and no additional regulations need to be enacted or modified to be directly binding. By contrast, in countries like Ecuador and Guatemala such provisions are non self-executive or programmatic rules, which mean that the enactment of regulations is required for them to be binding as national law.

Second, questions have arisen as to how the Convention must be applied and what the meaning and extension of the consultation process and participation are. For instance, is it compulsory for governments or investors to follow the recommendations given by the indigenous people? What if the recommendations are not efficient for the investor? If we were to assume an extreme position, indigenous people would become managers of the projects. On the contrary, if we were to disregard their opinions, the whole purpose of having a consultation process would be diminished.

Finally, more balanced positions have fostered the reaching of agreements between investors and indigenous people focusing on taking into account their views and positions toward the development of mining projects.

Protected Natural Areas

Protected areas have been spreading exponentially throughout the region. As a matter of fact, by 2007 the region had over 4,000 protected areas covering an area greater than 4 million of square kilometres corresponding to more than 18 per cent of the terrestrial's surface and 20 per cent of the protected areas all over the world.

At the international level, the most important instrument on protected natural areas is the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere ("Washington Convention") dated 12 October 1940. Up to now, a total of 19 Latin American countries have ratified the convention including Argentina, Brazil, Chile, Colombia, Ecuador, México, Paraguay, Peru, Uruguay and Venezuela.

The purpose of the Washington Convention is "to preserve in their natural habitats all species and genera of native American fauna and flora from extinction, and to preserve areas of extraordinary beauty, striking geological formations or regions of aesthetic, historic or scientific value". To achieve these purposes, governments undertake to establish national parks, national reserves, nature monuments, and strict wilderness reserves.

Although the Washington Convention has been precise as to, for example, forbidding the exploitation for commercial profit in areas declared as national parks unless a law declares so, the implementation thereof and national legislations on the matter have been as varied as countries and visions exist. Furthermore, there are uncertainties on the mechanisms to establish the natural protected areas, including who is entitled to declare them, the process of doing it, and the inclusion of participatory provisions for all interested stakeholders.

Water Scarcity

Water scarcity around the world has become increasingly important, in the mining industry, water provision is a key element. Companies are focused in finding access to water sources to supply future mining projects; reducing water consumption in their mining processes (actually companies have achieved to reduce the use of water in 42 per cent in their metal concentration process and 65 per cent in the hydro-metallurgical process between 2000 and 2006); and using sea water for the whole mining operation, even implying the construction of long pipelines to transport water from the coast to the mine.

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Other important matters that also represent a challenge to Latin American lawyers, particularly regarding their legal implementation, include the reclamation and closure of mining facilities and related environmental costs and liabilities; bilateral mining treaties signed by some Latin American countries; complex energy situation, which has led to some mining companies to look for alternative sources of energy, including possible investment, such as geothermal opportunities or building their own power generation plants (including LNG facilities) mainly to secure their needs but also to supply third parties, as the revenues appear to be interesting; escalation of labour-related burdens and pressures, including rules to rigidify the labour relationship put in place in some countries. Exploration options and joint venture agreements are becoming ever more sophisticated, as often mining properties owned by different individuals must be brought together to make a project attractive and owners of mining concessions require a greater share in project profits through mechanisms such as Net Smelter Return or Net Profit Interest; and the attempt in some Latin American countries to implement a venture capital market to finance exploration, trying to replicate the Toronto Stock Exchange model, including the approval of codes on resources and reserves, regulations on qualified person, etc.

In connection with the financing of mining production, project finance continues to be used as traditionally structured, through direct or syndicated loans from national or international banks, multilateral agencies or export credit agencies, or a combination of such sources. Lately, mining companies have started to use other vehicles, such as stock or bond issuances in the domestic or foreign markets, or mining infrastructure leases (the latter has been successful particularly in expansions of mining projects currently in production, at conveniently low costs). Additionally, the sale of future production or a royalty over the same, such as the old avío, is being used as a way of financing.

The outlook for Latin American mining is auspicious, among other reasons, because of the strong demand for minerals by the Chinese, Indians and other Asian economies, increasing at annual rates of approximately 10 per cent. Currently, there is an investment portfolio in the region of about US$60 billion for the next five years, especially in Argentina, Brazil, Chile, Mexico and Peru.

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