

Chapter 25  
SOCIAL LICENSE IN DEVELOPING COUNTRIES

Jorge Paz Durini  
Paz & Horowitz  
Quito, Ecuador

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### **§ 25.01 Involvement of the Community in a Mining Project<sup>1</sup>**

#### **[1] What is a Social License?**

The meaning and concept of the term “social license” continues to evolve. It is difficult to find one generally accepted meaning of this term because, among other reasons, the concept of social license is found in several countries that are in different stages of development, with different backgrounds, languages, and political situations. Social license has been defined as the “unwritten acceptance of a business or industry by society which allows it to operate.”<sup>1.1</sup> This seems to be the simplest and most widely accepted concept of what constitutes a social license. Clearly, a social license is not a contract with specific terms and an effective date; rather, it is the result of a relationship among different actors in the development of an industrial project.

It is generally accepted that the process of complying with regulations often fails to take into account the interests and rights of people who may see a significant change in their lives due to the development of a project. The rights and expectations of society are often so individual that it is not possible to address all of those expectations in the regulations. The social license implies acceptance by the people whose lives may be influenced or affected by a

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<sup>1</sup> I present my deepest regards and appreciation to Miguel Grau from Grau Lawyer Buffet, Lima, Peru, and Pablo Calderón Quintero from Brigard & Urrutia Lawyers, Bogotá, Colombia.

<sup>1.1</sup> Mark Lovelace, President, Humboldt Watershed Council, Social License, available at <http://www.newforestry.org>.

project, beyond simple legal approval of the environmental requirements.

Since there is a general understanding that the purpose of regulations in this area is to address minimal societal expectations, a company that wishes to succeed in developing its project will often go beyond these legal requirements in order to gain community support and acceptance. A social license therefore becomes the way to obtain this support and acceptance. It is said that the social license “is based not on compliance with legal requirements (although breach of these requirements may jeopardize the social license) but rather upon the degree to which a corporation and its activities are accepted by local communities, the wider society, and various constituent groups.”<sup>2</sup>

It is easier to define the social license than to determine the process to obtain such license. Providing information to and consulting with the affected communities have a very important role. “A social license is earned by acquiring free, prior and informed consent from indigenous peoples and local communities.”<sup>3</sup> Many countries have established regulations for mandatory dissemination of Environmental Impact Assessments (EIA). In some places a regulated consultation process with the communities complements this informative process.

Several problems have arisen between companies and communities in countries such as Panama, Peru, Ecuador, and Bolivia, which have large groups of indigenous people with limited education levels, and little or no experience in mining development. In these countries, mining projects normally are located in quite remote locations where the central government has little or no presence, and where communities are “disadvantaged in terms of economic prosperity and quality of life.”<sup>4</sup> This makes it more difficult to explain the possible benefits and impacts of an industry or project. The community’s opinion in Ecuador and Peru is solely

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<sup>2</sup> Social License and Environment Protection: Why Businesses Go Beyond Compliance, p.10, Neil Gunningham, Robert A. Kagan, Dorothy Thornton (University of California at Berkeley 2002), <http://repositories.cdlib.org>.

<sup>3</sup> Salim, Emil, Striking a Better Balance: The World Bank and Extractive Industries, pp. 1-92, Vol. 1 (2003).

<sup>4</sup> Jacqueline Nelsen and Malcolm Scoble, Social License to Operate Mines. p3, <http://www.mining.ubc.ca/files/SocialLicense/Final%20MPES%20Paper.pdf>.

referential and is obtained for informational purposes. In Peru, at least, the environmental and mining laws continue to be revised to enhance dissemination of information and make the consulting process more effective. This also has been the case in Colombia, where its constitution established these processes in 1991 and where the community's opinion may be binding.

Another topic of debate is whether community participation in the economic results of the project should be a prerequisite for obtaining the social license. This participation can take different forms. It can include subrogation of governmental duties (i.e., provision of medical facilities, education, electricity, and the like); generation of income for the local socio-political organizations that receive proceeds from patents paid to the central government; and even direct ownership and participation of the communities in the projects (in forms of participating interests or direct royalties).

These alternatives are some of the ways of obtaining the social license in order to avoid the problems that have been created in the past due to the remote communities' lack of acceptance. This lack of acceptance has often created civil unrest and confrontation, as reported in a World Bank study that confirms that "this is no more evident than in Latin America where the first world attitude and methods came into conflict with indigenous and local people, as well as international activism groups."<sup>5</sup>

Non-governmental organizations (NGOs) often have supported remote communities in the information and consultation process concerning possible impacts of a mining project. Unfortunately, on many occasions the best interests of the communities have not been properly evaluated. Rather, the communities have simply been used as part of the worldwide confrontation of certain environmental groups against mining companies, and the local communities' interests have been disregarded. In these cases, communities are simply used as forces in this mega-confrontation. Often their well-being is ignored and they become just part of the accepted casualties in a global confrontation.

One cannot stress enough the fact that each party needs to have total independence from other interests in order to properly eval-

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<sup>5</sup>Gary McMahan, ed., *Mining and the Community: Results of the Quito Conference* (Energy, Mining and Telecomm. Dep't, World Bank 1998).

uate its own risks and benefits. Only a properly educated and well-balanced decision can render a project viable. Within the context of this difficult process, it has been said that a social license “is acquired through mutual agreement in a forum that gives communities leverage to negotiate conditions, as well as an offer based on multidisciplinary analysis (Salim 2003).”<sup>6</sup>

Nelsen and Scoble suggest that in order to succeed in the process of developing a mine project “[a] company needs to have a mine planning process that enables an integrated and comprehensive analysis of the political, economic, social and technological factors that characterize the situation in which the mine would likely operate.”<sup>7</sup> They recognize that getting a social license requires careful planning that should include an analysis of several factors, including political and social factors.

Reaching a mutual agreement with the community is not an easy task. Even defining the extent of the word “community” can be difficult. Community, generally speaking, is understood to consist of the people who are likely to be immediately affected by the development of a project. However, nearby towns, and even cities with jurisdiction over the location, also may be affected. Therefore, the first question is where does the community end? Can an agreement be reached with some groups and not with others, and could this create more conflicts than solutions? Needless to say, very difficult situations may arise. Indeed, it is possible that in less-developed countries the social license still may be too high a goal for small projects that may be of interest only to the immediate community and to which very strong internationally financed NGOs are opposed.

In developing countries, governmental entities generally have a great interest in regulating mining activities and the public dissemination and consultation processes for EIAs. For example, the consultation process is absolutely necessary in Colombia where the mining laws designate some areas as being protected as traditional property of ethnic communities. The law gives these com-

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<sup>6</sup> Nelsen and Scoble, *supra* note 4, at 1.

<sup>7</sup> *Id.* at 4.

munities decision-making and preferential rights.<sup>8</sup> Peru also recognizes indigenous and Afro-Peruvian areas. These communities must be consulted if the mining activity is going to take place in these areas. Nevertheless, the consultations are still informational only, and implementation of recommendations received is not a condition of granting government permission for a project.<sup>9</sup>

International entities such as the World Bank and United Nations are also interested in promoting the dissemination and consultation process, especially with indigenous people. Latin America has adopted the International Labor Organization Convention No. 169,<sup>9.1</sup> which requires participation of indigenous communities in the development of projects involving natural resources.

Public consultation is one of the first steps towards obtaining a social license. The following is a review of some of the alternatives and different approaches in relation to this initial step.

#### **[a] Dissemination Process and Public Consultation**

A distinction must be made between the dissemination of information process and the public consultation process in Ecuador. It is generally accepted that a dissemination process is a rather limited process that applies to the immediate community and the area of influence. Its purpose is to make people aware of the existence of an approval process for the terms of reference or for the conclusions of some study, such as an environmental audit. The dissemination process is to create general awareness of an ongoing process or the results of such a process. It is widely used to explain the terms of reference under which a further study or program will be implemented. This process serves as the initial point of contact with the community and also is an initial tool to create interest and to receive comments. Because the sole objective of the dissemination process is to inform the community about the process or the results of a process, it is, in a sense, a one-way communication.

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<sup>8</sup> Calderón Quintero, Pablo. Legal Opinion, Brigard & Urrutia. Carrera 7 # 71-21 Torre B Piso 4 Bogotá, Colombia.

<sup>9</sup> Grau M, Miguel. Legal Opinion, Grau Buffet. Av. Santa María 110-Miraflores Lima 18, Perú.

<sup>9.1</sup> ILO Convention 169 (1989), available at <http://www.ilo.org/public/english/indigenous/standard/index.htm>.

In contrast, the public consultation process is a more complex and organized procedure. Its main objectives are to inform about possible impacts of an industrial project and to receive, catalog, organize, and respond to the communities' questions and concerns. Public consultations are entered into with communities that are well outside the immediate area of impact. They involve not only the communities in the surrounding area, but also the authorities having jurisdiction or interest in the area. The public consultation process is far more structured and documented. Moreover, facilitators provided by the interested parties and/or the government in charge of the process may participate in the public consultation process.

The public consultation process is also informational and non-binding in Peru. The Peruvian consultation process is limited in scope to the immediately affected area and to the communities therein. Local governments having jurisdiction over these areas are not involved in the consultation process.

As a result of the consultation process, there should be a list of issues. Some may be resolved during the process and some may be dealt with during the execution of the project. The consultation process may lead to substantial changes to the project and contain information on the issues that need to be addressed in order to obtain a social license.

#### **[i] Dissemination of Environmental Impact Assessment (EIA) Terms**

In Ecuador an EIA is required for every activity that may cause an environmental impact. The EIA must be approved before starting proposed activities.<sup>10</sup> In order to obtain the approval of the Terms of Reference (under which the EIA will be prepared), these terms should be made available to the communities. The Terms of Reference provide communities with information and help them learn about possible impacts to their area.

Article 15 of the Ecuadorian Environmental Regulations for Mining Activities establishes that the content of all environmental impact evaluations and environmental audits shall be dis-

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<sup>10</sup> Article 6 of Environmental Management Law. The use of non-renewable natural resources in accordance with the national interests requires an environmental impact study.

closed to the public. Holders of mining rights are responsible for this dissemination program. The communities in the project's affected area and the authorities in charge of this community shall be informed of the environmental program and studies.

EIA approvals for mining activities are also required in Peru for protected areas. In this case, it is the Natural Resources Institute, an entity of the central government, which issues this license. Peru also has a special regime for indigenous communities in designated territories.

### **[ii] Public Consultation**

The following statements serve to provide context for the discussion of the public consultation process:

- “Public consultation [is the] process by which the public's input on matters affecting them is sought.”<sup>11</sup>
- “To secure the project access and ensure that invested assets eventually see a return, leading companies recognize the need for community consultation and the delivery of tangible benefits to impacted communities.”<sup>12</sup>
- “Free, prior and informed consent is defined as the right of communities to be informed about exploration, development, and closure activities on a full and timely basis, and to approve operations prior to their commencement. This includes participation in setting the terms and conditions addressing the economic, social, and environmental impacts of all phases.”<sup>13</sup>

Articles 2, 5, 15, and 27 of the International Labour Organization's Indigenous and Tribal Peoples Convention 169,<sup>13.1</sup> which is part of the Ecuadorian legal system as well as that of several Latin American and other countries, establish the obligation of the government to develop community participation, when possible, through systematic and coordinated measures. The public consul-

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<sup>11</sup> <http://en.wikipedia.org/wiki/Consultation>.

<sup>12</sup> Sustainability Perspectives: Winning the Social License to Operate: Resource Extraction with Free, Prior, and Informed Community Consent p.1 (February 2008), at <http://www.ethicalfunds.com/SiteCollectionDocuments/docs/FPIC.pdf>.

<sup>13</sup> *Id.*, Consultation to Consent, p 4.

<sup>13.1</sup> ILO Convention 169, *supra* note 9.1.

tation process is obligatory every time the government plans to take administrative or legislative action that could directly affect the community and the lands that they use for traditional subsistence activities.

Convention 169 also considers the treatment of the community and the actions and appropriate procedures that its representatives can take before granting the social license. This international convention especially notes the importance of the public consultation process and its objective: reaching a “win-win” negotiated agreement between the communities and the government concerning the exploration and exploitation process.

The United Nations Declaration on the Rights of Indigenous People<sup>13.2</sup> recognizes the importance of obtaining free, prior, and informed consent before adopting and implementing an administrative measure that affects the communities and their environment, and this is the main legal basis for conducting the public consultation process for natural resources projects.

The following observation is of value in this context:

As the project advances the company must be proactive in establishing a direct relationship with the local community based on respect, inclusion and consultation. It will, however, be subject to constant change and require continual modification. Community relations should be based on a real understanding of the community. A social profile or risk assessment may be needed to ensure that local sensitivities are known. Expectations must be managed proactively and the company must honor any and all commitments made to the community. A community relations strategy is required that is culturally sensitive, relevant to the community and matched to the scale and intensity of the operation.

During the operational phase, the company needs to ensure that the promised benefits of mining really do accrue to the local communities. Given the realities of Latin America, this will mean some level of direct corporate investment which, ideally, is achieved through a process of consultation and shared implementation. Projects should be integrated with the existing infrastructure; meet community needs and be capable of continuing successfully without the presence of the company.<sup>14</sup>

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<sup>13.2</sup> <http://www.iwgia.org/sw248.asp>.

<sup>14</sup> Susan Joyce & Ian Thomson, *Earning a Social License to Operate: Social Acceptability and Resource Development in Latin America*; <http://www.oncommonground.ca/publications/license.htm>.

Article 88 of the Ecuadorian Constitution establishes that the community should be consulted, and their criteria obtained, for every decision that could affect the environment so that the community will be completely informed. Article 84 also recognizes and guarantees the right of indigenous people to be consulted about prospecting, exploration, and exploitation plans, programs, and projects of non-renewable resources that directly affect the environment or cultural areas. It also considers the right to participate in the benefits of those projects and to receive indemnification for losses that it produces.

Articles 28 and 29 of the Environmental Management Law consider the right of any person to participate in environmental management through the mechanisms established in the law. Ecuadorian law further stipulates that every person has the right to be timely and sufficiently informed of every activity that could produce environmental impacts.<sup>15</sup> The legal and practical reasons for conducting public consultations are clear. However, the practical question about the timing for implementation varies from place to place. There are two basic alternatives for conducting this process: (1) after mining rights (concessions) have been granted, and (2) prior to granting of mining rights.

Article 15.2 of the 169 Declaration creates the duty for the government that owns mineral rights to determine the procedures for public consultations with the communities that may be affected before the start of any prospecting and exploration program.

Ecuador recently established<sup>16</sup> that the consultation process shall take place during the approval process for the Environmental Impact Study (EIA). The regulations to the Mining Law also require that no mining activity shall take place unless the corresponding EIA for that phase has been approved. Consequently, the consultation process must be carried out after the mining concession has been granted but before any mining activities are conducted. The consultation process is not one consultation but a series of consultations that are to be made as the project advances from prospecting to advanced exploration to exploitation.

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<sup>15</sup> Article 29 of the Environmental Management Law.

<sup>16</sup> Executive Decree 1040 of April 22, 2008.

Colombia recognizes consultation as a preferential right of indigenous communities in some areas before mining rights are granted and mining activities are initiated. However, the results of these consultations are not mandatory.

Peru also recognizes special consultation rights of indigenous communities. Consultations may be made at any time during the process and the results are informational and not mandatory.

## **[2] Effects of Public Consultation**

Public consultations have various effects. The results may become mandatory during the permit approval process or the government may use them for guidance in order to consider points of interest to the communities. Public consultations can certainly have stronger effects concerning the social license process because this is the frequent cause of opposition.

The World Resources Institute identifies the following set of risks for companies facing community opposition to resource extraction projects: (1) Financing Risk, (2) Construction Risk, (3) Operational Risk, (4) Reputation Risk, (5) Corporate Risk, (6) Host Government Risk, and (7) Host Country Political Risk. “Communities often hold the project sponsor responsible when the host government lacks capacity or political will to address concerns. Advocacy efforts aimed at the host government could lead to enforcement actions, civil or criminal penalties, tougher regulatory requirements, and/or withholding or withdrawing permits, and licenses.” “The business environment for a company or industry may deteriorate if similar grievances in a country or region accumulate, with the host country being less accommodating to private industries.”<sup>17</sup>

Clearly the statement that “[c]onsultation is not equivalent to consent”<sup>18</sup> applies to mining projects where it may be harder to obtain community consent than to simply complete the consultation process. In general, this author has found that the consultation process may have two levels of effect depending on the country, the project, and the development stage of the project. They are (1) informative level, and (2) mandatory conclusions. During the approval process for environmental impact studies and the is-

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<sup>17</sup> See *supra* note 12, at The Risks of Community Opposition, p 3.

<sup>18</sup> *Id.*, at Takeaways and Action Items, p 5.

suance of an environmental license, the results and conclusions of the consultation process are informative—these suggestions may be considered but they are not mandatory. It is clear, however, that these conclusions must be properly addressed and solved when obtaining a social license.

In Ecuador, the consultation process should ensure that the community's comments are incorporated into the environmental impact studies and considered during the execution of every phase of activities.<sup>19</sup> The purpose of social participation is to gain knowledge and to integrate the initiative of the citizens in order to fortify environmental impact evaluations and decrease the risk of environmental impact.<sup>20</sup> This informative level is developed in the environmental impact study and environmental control proceedings as set forth in Article 7 of these same regulations.

- Public consultation is required for the approval of the environmental impact study. If not, the process stops, and the mining project cannot be carried out.<sup>21</sup>
- From a legal standpoint, the conclusions of the communities' participation in the consultation process are at the informative level. As a result, not all of their conclusions may be considered in, and integrated into, the EIA and later implemented.

In Ecuador, the opinion of the community is not determinative. This is also true in Peru. However in Colombia, in some special cases, the opinion of indigenous and Afro-Colombian communities is determinative as they are granted preferential rights for mining activities on traditional lands. The Ecuadorian President has announced that the new Constitution will include the concept that community opinion will be non-determinative. If the majority of the community opposes a particular project, the government's clear intention is to discuss this matter at a higher level in order

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<sup>19</sup> Article 9 of Executive Decree 1040.

<sup>20</sup> Article 6 of Social Regulations for the Social Participation Mechanisms Concerning Environmental Management.

<sup>21</sup> Article 10 of Executive Decree 1040.

to make a final decision.<sup>22</sup> Notwithstanding the above, at the time this chapter was written, these statements by the President had not yet been integrated into the new Constitution being drafted.

These principles have been used in practice, and the communities' opposition to a project has not been determinative—this, however, contradicts the intended process for obtaining a social license. In fact, any company that is in the process of obtaining EIA approval should carefully review the community's concerns in order to resolve the reasonable questions and issues concerning possible risks and the respective mitigation measures that are required to reduce these risks. Of course, it is clear that not all of the communities' ideas should be subject to mandatory implementation, since that would result in even the most absurd petitions being obligatory. However, the plans and suggestions that could directly resolve or alleviate impacts, as well as those that protect the people's rights, must be considered.

In South America, the provisions of Article 5.2 of the 1969 Declaration granting the communities the right to participate in the benefits or profits of a project are often not recognized by the governmental or local laws. Ignoring legitimate concerns may lead to the legal approval of an EIA; but it may very well result in a final rejection by the impacted communities. For this reason, the author believes that the results of the public consultation should become mandatory in order to obtain a social license. It has been concluded that: "The bad news for resource companies: winning community support is going to be more difficult in future. Community capacity to resist company proposals is increasing."<sup>23</sup>

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<sup>22</sup>The community shall be consulted regarding all government decisions that may affect the environment; broad (dissemination) shall be timely made.... The State shall weigh the opinion of the communities in accordance with the terms contained in the laws and international treaties regarding fundamental rights. If, pursuant to the above-mentioned consultation process, it is revealed that a majority of the respective community opposes (a project), then a resolution as to whether or not to proceed with the project will be adopted only pursuant to a properly reasoned decision of a higher authority....

El Comercio, July 5, 2008, at 6.

<sup>23</sup>*Supra* note 12, at Concluding Remarks, p 7.

### **[3] Stakeholders in the Public Consultation Process**

If the results of the public consultation are to be taken into consideration, either from a legal standpoint or from a practical and responsible view, the question is who should participate in this process. We often find the following participants: (1) participants with legitimate interests and (2) lobbyists and special interest groups.

#### **[a] Participants with Legitimate Interests**

The first are the natural and legitimate participants. The regulations have defined who they are.<sup>24</sup> They include the people within the community that may be affected by the execution of a mining project, as well as existing indigenous or Afro-American organizations (if applicable), and the local and regional authorities. They are easier to list than to define. In practice, the extent of a mining project's impact varies from the local to the national level. Depending on the situation or through regulation, as in Ecuador,<sup>25</sup> there may be other direct or indirect actors and stakeholders, such as:

- regional governmental authorities,
- county authorities (Parish Boards), or
- indigenous organizations or community organizations that may exist in the area.

It is difficult to define those people who are in the area of direct influence since, at least in Ecuador, from an economic viewpoint an area of direct influence may be quite extensive.

While the participation of directly affected people is essential to the success of the project, the participation of indirectly interested parties may distort the process. This is the case with indigenous organizations that are not local organizations, but rather national and political organizations. There is a difference between the local groups that seek the well-being of their members and those that have a broader political agenda. The latter fall into the next cate-

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<sup>24</sup> Article 15 of Executive Decree 1040 of April 22, 2008.

<sup>25</sup> *Id.*

gory of groups that are often involved: the lobbyists and special interest groups.

**[b] Participation of Lobbyists and Special Interest Groups**

The consent of these groups is not required, nor does the law recognize it. But in practice these groups (both local and international NGOs) play strong roles, as they are formed to specifically oppose any mining initiative and strongly influence the media in the consultation process. NGOs frequently take the lead in opposing mining projects because their objective is to stop and prevent any mining activity. Their interests are often quite different (and more radical) than those of the communities. This is evidenced when NGOs oppose a project without making an in-depth analysis of its specifics and the possible benefits that it could bring to the community and country.

This does not mean that there are not many well-intentioned NGOs that provide good guidance in consultation processes that may result in the adoption of effective actions. Unfortunately, these types of NGOs are the exception, not the rule. Pressure groups generally oppose a project without opening a dialogue or making an in-depth analysis on a case-by-case basis. Likewise, politically driven organizations frequently oppose mining projects without carefully reviewing their specifics because they are merely interested in the political benefits they may obtain.

A lack of understanding of a project, and blind opposition to it, may lead to major community disasters. This was the case with the Junin Mining Project in Ecuador. In this instance, outside organizations burned the camps and forced the people in charge of a Japanese technical assistance project to leave. The Japanese government had provided technical assistance at the request of the Ecuadorian government, but the opposition forced the Japanese government to cancel the project. Ecuador lost an important project, and the actions of these outside organizations have caused great social unrest concerning the development of mining projects in this area. Private investors that have come to the area to conduct further mining exploration have also given up their efforts due to the opposition of local people and local authorities. The situation has deteriorated to a point where there is no open dialogue, and foreign NGOs are financing social confrontation,

which has effectively prevented constructive communication and a proper evaluation of mining's risks and benefits and of the mitigation measures that could be adopted. While this has gone on, extreme poverty continues to be the norm for the majority of the area's inhabitants. It is the poor, quite frankly, that often have been manipulated and misused by international and local anti-mining activists for the latter's political benefit.

Peru has also had problems stemming from community opposition to mining activities. These protests have affected initial phase and exploration time periods. In that country, as in Colombia, mining opponents have sought to stop mining activity by alleging that mining companies have not complied with their obligations.

### **[c] Local Authorities vs. Central Government**

In some cases, the interests of the local authorities are opposed to those of the central government. In others, the local authorities have interests additional to those of the central government. In both cases this converts the issue into a political problem. In the process, the real nature of the communities' problems is often forgotten. It is clear that there is one certain loser when issues are politicized: the community. In these cases, the community's real interests and rights take a back seat, and actual impacts and solutions are not considered. This is not to say that every mining project must be approved. But the government's ability to make educated decisions on whether or not to grant mining licenses, as well as the community's ability to get involved and solve its own concerns, is often lost in these political and legal battles. Further, obtaining a social license is nearly impossible in those cases where strong outside participants play a leading role.

Often the local authorities (provincial and municipal) do not have the means and expertise to properly review and evaluate the studies that are filed and the mitigation measures that are proposed. This is especially the case in some Latin American countries, such as Ecuador, that do not have large-scale mining experience and expertise.

#### **[4] Who is Responsible for Directing the Consultation Process?**

Either interested parties or the government can carry out the public consultation process. Both alternatives are used in different places. Ecuador has switched from the first type of process to the second.<sup>26</sup> This consultation process by the government is generally required before activities having possible impact can be conducted. Also, it is common for the consultation process to be carried out as part of an environmental impact assessment (EIA) approval process. The questions and issues raised by the community may be incorporated into the terms and conditions of the EIA approval.

Often the legal approval process may lead to uprising by the communities whose opinions may not have been heard. The success of obtaining a social license often hinges on properly addressing these concerns and on differentiating the legitimate and valid concerns of interested parties from the purely political interests of the pressure groups.

We have found the following from our analysis of the two above-mentioned alternatives.

##### **[a] When the Process is Carried Out by Interested Parties**

In this process the government is typically involved in approving the Terms of Reference (TOR) for the process and the EIA. The government normally acts through a specialized agency or ministry,<sup>27</sup> which is in charge of monitoring the process and issuing the corresponding approvals. Under this process, the TOR generally require that information booths or stands be set up in order to disseminate information about the proposed project and inform the communities of the benefits, risks, and mitigation measures that will be discussed further in a subsequent “town hall” meeting.

The TOR can stipulate the various methods that shall be used to collect community concerns. One of the most common methods

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<sup>26</sup>Executive Decree 1040 of April 22, 2008.

<sup>27</sup>In Ecuador, the agency is the Ministry of Environment which, under certain circumstances such as mining, has delegated its powers to the Ministry of Mines and Petroleum’s National Directorate for Environmental Issues (DINAPA).

is to gather the community in a town hall meeting with a question and answer period. The downside of this method when carried out solely by the interested party is general distrust in the communities.

**[b] When the Process is Carried Out by Government**

In Ecuador, Decree 1040<sup>28</sup> recently created a regulated process where the government (for the first time) will be in charge of the consultation procedure. Under this method, the costs of the consultation process shall be passed on to the applicant. This regulation establishes broad alternatives for receiving comments and responding to questions. It includes the use of a web page designed for this purpose. It also includes definitions as to how the process should be carried out.

On paper, the process seems more reasonable because it is the government that directly explains the project's pros and cons. Depending on the concerns and responses of the interested parties, this should mean that approvals might be granted more quickly and on a more informed basis.

Governmental participation in the process, if conducted by properly qualified consultation specialists, may very well improve the process, as the issues could be treated in a more technical manner than they have been in the past. Moreover, community concerns may also be properly addressed under this new modality because the government is interested in striking a workable balance between economic development and environmental interests. Thus, the government has a built-in incentive for separating legitimate concerns from those of pressure groups. The other benefit of this new process is that it establishes a more widely and generally known procedure, as opposed to one that may be specific for one process. This will make it easier for people to submit their concerns and for the authority to follow a delineated process.

The potential downfall of a government-driven process is that it could be subject to typical governmental delays caused by personnel shortages, heavy caseloads, and/or red tape. Since this process is new to Ecuador, we do not yet know how effective it will be. In our research, we were not able to find any other country in Latin

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<sup>28</sup>Executive Decree 1040 of April 22, 2008.

America where the government is solely responsible for carrying out the consultation process. In Colombia and Peru, for example, the environmental authority oversees the process—not the mining company or independent consultants.

#### **[5] Risk of Public Consultation Process**

The risks of the consultation process include project suspension, cancellation, or delay.

##### **[a] The Fear Factor**

The Intag River Region of Ecuador, in which the Junin Project is located, is one of numerous areas where intense social conflict has been instigated across the country to oppose exploration efforts and the possibility of initiating large-scale metal mining in the country. Communities in the Intag area, which have been organizing against mining activities since a Japanese corporation conducted exploration activities in the mid-1990s, have repeatedly expressed their opposition to mining because of its anticipated impacts on nearby communities and on the area's spectacularly diverse cloud forests.

In the Junin case, it is clear that the administrative process has been delayed for years. The prospecting phase initially began in 1992 and 1993. In 1997, the community (aided by NGOs) initiated a severe conflict that ended badly with the burning of the camp. In 2004, the Ascendant Copper Corporation conducted a preliminary study without carrying out a public consultation process. The facts show that the Junin community was divided because of the participation of NGOs. Dissemination and public consultation were conducted in 2005, but part of the community filed a constitutional protection action in order to stop the project. The claim is still pending for resolution and the environmental impact studies have not been approved.

Because Ecuador does not have any experience with modern large-scale mining projects, the communities' main fear is often that these new mining projects will be like the (often illegal) small-scale activities that have caused severe social and environmental damage. One such example was Nambija, where at one time nearly 10,000 people lived a subsistence life on small-scale mining, fearful that they would not live to see the next day. This huge group of subsistence miners caused great damage to the

communities and left the area's rivers severely polluted. Fear is one of the most common reasons why Latin American communities have had negative reactions to mining. As in Ecuador, Colombian and Peruvian communities have feared potential irreversible environmental damage.

We have also seen that outsiders often play on the communities' fears by recounting mining disasters that occurred in the 1950s, 1960s, or 1970s, in order to give the impression that this is what they will be subject to if they allow modern, large-scale mining in the area. This, of course, increases the fear factor. These disinformation campaigns play on the communities' fear of the unknown, and/or their lack of technical expertise in evaluating the real potential risk, the investor, and the proposed environmental mitigation and risk reduction measures. These campaigns often lead to uprisings and confrontations between supporters and opponents of a particular mining project.

The new consultation rules now in effect in Ecuador may eventually lead to a new guided-consultation process entailing greater technical analysis and less political/environmental extremist positions. This could allow the parties to effectively decide whether exploration works can be conducted.

#### **[b] Desire to Participate in the Project's Benefits**

Overestimating the economic potential of a project is another risk of the consultation process. When communities, often abandoned by the central government, see a potential project as a way of solving all their problems, there may be confrontation that can hinder the project from being developed. Communities in isolated areas often not only rely on these projects as their sole source of income, but also look to the operators/investors to provide basic services (i.e., electricity, drinking water, education, medical attention, and other services). Starting in the 1970s, oil companies in Ecuador provided these services in remote communities where the central government did not. The results were not ideal, as social acceptance of a project was influenced by the level of free services (including electricity and medical services) provided. When companies closed their operations, communities demanded these services from the government that had long neglected them. When the government could not provide all of the requested services, confrontation ensued.

**[c] Political Gain**

Sometimes the consultation process fails because it is used for political gain. This occurs when an influential person or party uses a project for political reasons. A politician or party may gain political points by opposing a project. This type of non-technical opposition, however, often produces confrontation and stifles an analytical evaluation of the pros and cons of a project and of the benefits that the surrounding community would obtain if the project were developed.

Political actions to support ideological positions are the most dangerous. In Ecuador, the National Constitutional Assembly issued Mandate 06<sup>29</sup> (Mandate 06 or Mining Mandate) under the aegis of stopping the environmental damage created by “large-scale” mining concessions. This mandate rescinded many mining concessions and forced the suspension of almost all mining activities in Ecuador. Mandate 06 caused the largest loss of investors in mining projects in Ecuador in the last 20 years. Yet few know that this mandate was issued mainly to prevent an announced countrywide strike by an indigenous political organization that opposes mining for ideological reasons. This strike would have been the first national strike against the current government, which chose to avoid domestic turmoil in exchange for sacrificing the efforts of prior governments to promote foreign investment and stability in the mining sector. The political factors behind the issuance of this mandate were further reflected in the fact that those small-scale mining activities (which indeed do cause severe social and environmental damage) were not suspended because that would have caused opposition among the governing party’s supporters.

Political calculations do not benefit reasonable projects because a politicized process either imposes a mining project or stops it. This, of course, does not serve the purpose of the consultation process: to review and analyze the merits and drawbacks of a proposed project.

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<sup>29</sup> Mandate 06 is a law that the National Constitutional Assembly enacted by itself without the President’s approval or review. Under normal circumstances this is quite irregular, but as a factual matter the President was a co-author of this law because his party had a wide majority in the Assembly. Mandate 06 is available at [http://www.asambleaconstituyente.gov.ec/documentos/Mandate\\_minero\\_definitivo.pdf](http://www.asambleaconstituyente.gov.ec/documentos/Mandate_minero_definitivo.pdf).

## **[6] Public Consultation: Potential for Confrontation and Disturbance?**

The public consultation process is indeed where conflicts can and do arise. But a properly guided consultation process will minimize confrontation and provide guidelines to avoid conflicts and resolve disputes. The following issues, among others, may give rise to conflicts:

### **[a] Water Rights: Concerns and Conflicts**

The use of water generally creates conflicts based on concerns that water sources for human use could be polluted or that water levels for agricultural purposes could be affected. Small-scale mining operations have caused (and continue to cause) significant harm to water sources. Because of the very large number of people involved in small-scale mining operations, and because of the inappropriate and unsafe techniques that they employ, small-scale mining has produced large-scale pollution in Ecuador. Many rivers impacted by small-scale mining (such as the Nambija, Amarillo, and Once) exceed all allowable limits of heavy metals and other contaminants. Because there are no modern large-scale mining operations in Ecuador, opponents to mining have tried to portray it as small-scale mining on a larger scale.

### **[b] Discussion of Future Land Use: Conflicts with Farmers**

Large mining concessions in Ecuador have found opposition from farmers. Although farmers can restrict access to their land for exploration activities, some farmers view mining as a potential threat. Interestingly, the perceived threat is not environmental, but economic. Agricultural labor costs are significantly lower than salaries in the mining sector. Thus, medium- and large-scale farmers fear that the presence of mining companies in the area will increase their labor costs, and they therefore oppose all mining activities.

Ecuadorian law holds that surface property rights are different and independent from mining rights. However, mining rights (for the exploitation of metallic materials) may enjoy a preference and, therefore, there is also a risk to the farmers that they may be forced to sell their properties.

### [c] Protected Areas

The most important concern is the conflict between mining and protected areas, the question being whether mining can be conducted in such areas. As a matter of fact, this issue caused the drafters of the Mining Law of 1991 to ban all mining activities in national parks. However, there are many protected areas where mining could be conducted—depending on the nature of the activities.

Mandate 06<sup>29.1</sup> ordered the rescission of all mining concessions granted in protected areas. This is inconsistent with prior approvals and environmental audits that have allowed mining activities in protected areas pursuant to legislation that was in effect at the time. Mandate 06, however, does not order that the new Mining Law prohibit all mining in protected areas.

Therefore, the issue is what types of mining should be allowed in certain types of protected areas. Ecuador (like many bio-diverse countries in Latin America) bans all mining and industrial activities in existing national parks. Responsible mining companies universally support these policies. There are, however, other areas (such as extended buffer zones and protected forests) that are protected for other reasons in which, under controlled conditions and subject to a greater level of review, mining activities may be permitted.

Illegal mining activities are conducted within the boundaries of Ecuadorian national parks, such as Podocarpus National Park. Nevertheless, the NGOs focus their efforts on international mining companies, not on illegal and small-scale mining that causes significantly more damage. Unfortunately, conflicts concerning any type of protected area are usually generated by interest groups that are opposed to any kind of mining. Thus the corresponding debate is fueled by ideology and not a particular project's merits.

### [7] Can Mining Be Developed Without Community Approval?

It will not be possible to conduct uninterrupted mining activities without a social license in areas with large communities that oppose mining. Projects have often been suspended (temporarily or

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<sup>29.1</sup>*Id.*

for extended periods) when they have not had the communities' support.

Social unrest, such as that which was created in Junin, will either cause the project to be paralyzed for an extended period or force the mining company to return parts of its concessions to the government in order to reduce the level of social unrest. This happened in one case in which farmers' opposition to mining forced a mining company to give up nearly 10,000 hectares of land under exploration.

When social conflicts arise, the government usually issues a restraining order and imposes injunctions to suspend a mining company's activities until social unrest has settled. If a consultation process is not properly conducted, the likelihood for social unrest (and thus injunctions and suspension orders) increases. Again, it is clear that serious, ongoing mining activities cannot be developed without a social license.

## **§ 25.02 Recent Developments in Ecuador Affecting Mining Development**

### **[1] Mining Mandate: Reasons for Its Issuance/Political Environment**

It is clear that the recent changes to Ecuador's mining legislation are directly related to social concerns and claims. On the one hand, environmental groups (such as the Accion Ecologica—the extremist group that led to the burning of the Junin camp several years ago) and indigenous political movements have used the mining issue as a flag to gain political recognition and support. While neither group has substantial community support for its position, their joint efforts have caused a stoppage of serious mining activities and investments in Ecuador, while at the same time allowing all illegal activities to continue. In this author's opinion, it is indisputable that the actions of these interest groups have led to these recent developments. The National Constitutional Assembly issued Mandate 06 precisely under these conditions.<sup>30</sup>

#### **[a] What Is the Legal Nature of the Mining Mandate?**

It could be said that the Mining Mandate is similar to a law. It was issued by the Constitutional Assembly and has the validity of

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<sup>30</sup>*Id.*

a law. However, the Mining Mandate is not part of the Constitution. The application of the Mining Mandate may create a conflict with the property rights guaranteed under the 1998 Constitution as well as with the international treaties that protect the investments of foreign companies. The provisions of the 1998 Constitution and those of the international treaties have precedence over the Mining Mandate.

**[b] Is there any Legal Recourse in Ecuador Against the Mining Mandate Since It May Breach Fundamental Rights Protected by International Treaties?**

Because the Constitutional Tribunal (which was appointed by the President and acts under his orders) previously has ruled that no judge or tribunal can review any of the actions or decisions of the Assembly, the only legal recourse against the Mining Mandate is contained in the international treaties, especially those for the protection of foreign investments.

**[c] What Have Been the Immediate Consequences of This Mandate?**

As of the writing of this chapter, the following actions had taken place:

- The government had started drafting a new mining law, and in June 2008, planned to conduct a “road show” to publicize this effort internationally.
- The Ministry of Mines and Petroleum had begun to reject all pending applications for new concessions.
- Mining companies suspended all advanced exploration activities.
- Small-scale mining continued despite ongoing complaints that these activities cause great environmental contamination.
- Mining companies that have advanced projects were meeting with the Government to define their continuing activities and the start-up of construction activities for their projects.
- No advanced-stage concessions, or those having proven reserves, had been cancelled.

**[2] Cancellation of Mining Concessions: New Grounds for Cancellation or Extinction**

**[a] Have the Mining Concessions Included in any of the Cases Mentioned in the Mandate Been Cancelled or Extinguished?**

In the opinion of this author, since the Mining Mandate is a general provision, mining concessions cannot be cancelled or extinguished *ipso facto*. The first temporary provision orders the Ministry of Mines and Petroleum (MMP) to comply with the administrative regulatory acts in order to strictly comply with the mandate. Therefore, the MMP *must, on a case-by-case basis*, declare each and every concession to be extinguished or cancelled if it deems that the Mandate applies to a particular concession. Administrative law principles require a direct action by the government to issue a decision. In this case the MMP (through its regional mining offices) must issue the respective decisions.

**[b] Does the Extinction or Cancellation of a Mining Concession Based on the Mandate Constitute Expropriation?**

For the following reasons, the author believes that the extinction or cancellation of a mining concession by the MMP pursuant to the Mining Mandate will constitute expropriation if mining rights are not reestablished under the new law:

- (1) The Government of Ecuador (GOE) will take the property of the concession that previously was legally granted to a mining company.
- (2) The Mining Mandate clearly orders that no compensation will be paid; this breaches all current constitutional principles as well as those in valid international treaties (e.g., the Canadian-Ecuadorian investment treaty).
- (3) The GOE intends to have its new mining company take a share of (or control over) the property without providing any compensation.

**[c] If the Government of Ecuador's (GOE) Acts Constitute Expropriation, Is There any other Available Legal Recourse?**

Since Canada and Ecuador entered into a treaty to protect foreign investment, this author believes that there is legal recourse under this treaty to claim prompt and fair compensation in those cases where an investor is deprived of its property without just compensation. The actions to be taken are set forth in the investment treaty.

**[d] Grounds for Cancellation or Extinction**

The Mining Mandate orders the following:

Art. 1.- The extinction of all those mining concessions in the exploration phase for which no investments have been made in the development of the project, or for which environmental impact studies have not been submitted, or for which prior consultation processes have not been conducted, as of December 31, 2007, including those for which administrative resolution is pending, is hereby declared without any (right) to economic compensation.

Art. 2.- The cancellation of all mining concessions for which the conservation patents have not been paid within the period established in the Mining Law, that is the 31st of March of each year, in advance, from 2004, is hereby declared.

Art. 3.- The extinction of all of mining concessions located within the areas that the environmental authority has defined to be protected nature areas and buffer zones, and those that affect water mouths and outlets, is hereby declared without any (right) to economic compensation.

Art. 4.- The extinction of the mining concessions, in excess of three, that have been granted to an individual, or immediate relatives up to the fourth degree of consanguinity and second degree of affinity, or of related legal entities or companies, whether directly by the legal entity or through its shareholders or immediate relatives up to the fourth degree of consanguinity and second degree of affinity, is hereby declared without any (right) to economic compensation.

Non-metallic mining concessions in the exploitation phase are exempted.

Art. 5.- The extinction of all mining concessions that have been issued to officials or former officials of the Ministry of the Natural Resources, Ministry of Energy and Mines, Ministry of Mines and Petroleum, or their immediate relatives up to the fourth degree of consanguinity and second degree of affinity, for the use of privileged information for their personal interest, is hereby declared without

any (right) to economic compensation. Likewise, the cancellation of concessions that are currently held by third parties that were initially issued to officials or former officials of the Ministry of the Natural Resources, Ministry of Energy and Mines, Ministry of Mines and Petroleum, or their immediate relatives up to the fourth degree of consanguinity and second degree of affinity is hereby ordered.<sup>31</sup>

### **[e] Procedure**

For a mining concession to be declared cancelled or extinguished, the corresponding Mining Director should issue a cancellation or extinction decision and the concessionaire must be properly served notice thereof.

### **[f] Legal Effects of the Cancellation or Extinction Decision**

The titleholder will lose all property rights over the mining concession. All activity in the area must therefore be completely suspended. There is a question as to whether or not the environmental regulations that require titleholders to conduct environmental audits upon the cancellation of a concession would apply in these cases.

### **[3] Does the Mining Mandate Breach any Fundamental Right or Principle?**

The Mining Mandate breaches several legal principles. First, the Mining Mandate orders concessions to be cancelled or extinguished for grounds that did not previously exist. This violates a fundamental principle that the law cannot retroactively impose new conditions. It also breaches property rights and the right to receive a prompt and adequate compensation in the event that property is expropriated. Lastly, it breaches the rights that investors have under the investment protection treaties.

### **[4] Future of Mining in Ecuador**

#### **[a] The Proposed New Mining Law/Timing/Objectives**

There is no doubt that the Mining Mandate has been devastating not only for the millions of good faith investors whose investments have been wiped out, but also for Ecuador itself. The loss of confidence caused by this irresponsible legal action will have

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<sup>31</sup> Mining Mandate, *supra* note 29.

longstanding consequences. As of the writing of this chapter, the Government of Ecuador had committed to issue a new mining law before the end of 2008 in order to mitigate these consequences, and the new law was being drafted. Initial information would lead this author to conclude that the principles of the new law will be similar to existing ones, so much so that rather than a new mining law, it may more accurately be considered a revised version. This revised version purportedly will include royalties for the government, increased maintenance patents, and the introduction of an exploitation contract that must be executed as a condition to initiating the exploitation phase. This contract is supposed to include a possible tax stability agreement, social participation terms, environmental licenses, and other technical and tax regulations that shall apply to projects. In this author's opinion, in the short term, existing projects will have a good basis for continued development. It will take some time, however, before new grass-root funds are invested in Ecuador.

On the other hand, the good news is that lands that had been tied up by speculation will be opened up, and people may apply for these concessions without the high cost of intermediaries. As of the writing of this chapter, the first draft of the new Mining Law had been submitted to the President for his review, and the government had announced that the new Mining Law will be among the first laws that the new legislature will enact.