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COUNTRY REPORT: COLOMBIA
Mining Code Partially Unconstitutional

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Introduction

It is well known that economic growth and development often conflict with the environment. Thus it is important to promote sustainable development policies in order to diminish the impact that industry and other economic activities can have on the environment. One of the best tools to do so is adopting legislation that while allowing development, takes into account environmental and social protection.

In Colombia, mining has been considered for decades as one of the activities that contribute greatly to economic growth in the country. However, this activity should be developed as sustainably as possible to reduce the negative impacts upon the environment; since this activity is likely to adversely affect our natural resources such as water, soil and ecosystems.

In Colombia there are a number of norms regulating mining and related activities. One of the most important norms is the *Mining Code* adopted in 2001. This Code was recently partially amended by *Law 1382* of 2010.

Some months later, a constitutional lawsuit challenged *Law 1382* of 2010, because it was considered that some constitutional provisions were violated during process leading to its adoption. In this report I briefly examine the ruling of the Colombian Constitutional Court regarding the constitutionality of the challenged norm.

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The Mining Code as Amended by Law 1382 of 2010

In 2010, the Colombian Parliament adopted *Law 1382*, which partially amended the Colombian *Mining Code*.[1] The main object of this new legislation was to modernise the national mining activity; to amend some of the provisions of the *Mining Code* that had not proved to be effective in the management of mineral resources; to modify mining concession contracts in order to facilitate foreign investment; and to establish procedures that allow a safe and efficient mining activity, taking into account sustainable development criteria whilst encouraging economic growth.

Some of the amended provisions are specifically aimed at improving environmental protection in the context of mining. Article 3 of *Law 1382*, for example, provides various rules to ban mining in areas of environmental importance, including: areas declared for protection and development of natural renewable resources; those areas that make up the National Park System; natural parks of regional character; protected forest reserve areas and other forest reserve areas; paramo ecosystems; and wetlands designated under the Ramsar List. This article however also allows for the exceptional authorization of mining activities in forest reserve areas, through: removal from the general exclusions regime; and a request to the Ministry of Environment to mark out forest reserve areas in terms of a specific law.[2]

Article 4 of *Law 1382* requests that the Ministry of Mining and Energy develop a National Mining Plan, taking into account the environmental policies, norms and guidelines established by the Ministry of Environment, Housing and Territorial Development. In addition, article 8 provides that when areas that correspond to separate mining titles for the same mineral belong to the same beneficiary and are located close to one another without being contiguous, those areas can be integrated. One of the pre-requisite conditions for the integration of these areas is the obligation to amend the existing environmental license or to request a new license to the competent environmental authority for the integrated area.

[1] Law 685 of 2001.
[2] Law 2 of 1959.

Constitutional Lawsuit

Law 1382 of 2010, which partially amended the *Mining Code*, was challenged as unconstitutional, since some superior provisions that should have been complied with were violated.[3] The main argument was that the constitutional right to prior consultation afforded to indigenous and afro-descendant communities was violated. According to the *Constitution*, whenever a legislative or administrative measure may directly affect indigenous or afro-descendants, these people should be consulted about the proposed measures, through appropriate procedures and through their representative institutions.[4] Since *Law 1382* of 2010 affected the rights of indigenous and afro-descendant communities by regulating activities likely to be conducted in areas where these communities are settled, and because these communities also participate in mining activities as part of their cultural traditions, it was argued that these communities should have been consulted regarding the proposed legislative reforms.

The Constitutional Court therefore examined whether there had been a violation of the above constitutional right and if so, what impact this would have on the validity of *Law 1382*. The court acknowledged that in previous rulings it had recognized that when regulating matters such as territory, land use and exploitation of natural resources in areas where indigenous and afro-descendants are settled, prior consultation with these communities was required.[5] The court also analysed the possibility of drawing a distinction between those aspects of *Law 1382* which required prior consultation and those that did not.

The court ultimately ruled that: (i) all provisions contained in *Law 1382* are likely to be implemented in indigenous and afro-descendants territories; (ii) the provisions are systematically articulated to reformulate the concept of mining in the country; and (iii) the exploitation of mineral resources is a crucial aspect in the protection of the indigenous and afro-descendants cultural and ethnic diversity. It accordingly held that it was not feasible to draw the above distinction.[6] As a result, the court concluded that the whole of *Law 1382* was unconstitutional as the process leading to its adoption had contravened the constitutional imperative of prior consultation with

[3] Case No. C-366-11 (available in Spanish at http://www.corteconstitucional.gov.co/relatoria/2011/c-366-11.htm).
[4] Article 330.
[5] Paragraph 13(2).
[6] Paragraph 40(1).

indigenous and afro-descendant communities. The court also stated that this unlawful act could not be remedied and *Law 1382* should accordingly be removed from the Colombian legal order.

However, the court also held that the nullification of *Law 1382* could have an adverse effect on other valuable legal rights enshrined in the Constitution, particularly regarding the protection of the environment.[7] In this regard the court specifically referred to the provisions contained in *Law 1382* which seek to improve environmental protection in the context of mining. The court therefore considered the possibility of suspending the effect of the judgment. It held that there was available precedent enabling it to do so. Referring to its main function to serve as guardian of the integrity and supremacy of the Constitution, and the undesirability of creating a legal lacuna, it held that it was vested with the power to defer the effect of declaring a law unconstitutional until Parliament adopted a new law compatible with the Constitution.[8] The court accordingly declared *Law 1382* unconstitutional but postponed the effect of this declaration for two years to enable the Government and Parliament sufficient time to adopt new legislation in compliance with the constitutional imperative to consult in advance with indigenous and afro-descendant communities. The Court also stated that in the event of such legislation not being adopted in the two-year period, the nullification of *Law 1382* would stand.

Conclusion

The Colombian Constitutional Court is known as a very progressive court in Latin America thanks to its rulings. In this judgment, the court was compelled to simultaneously balance two constitutional rights, namely: prior consultation of indigenous and afro-descendants communities; and the protection of the environment. It ultimately reached a creative solution by suspending the effect of its ruling for two years, thereby providing for interim environmental protection until such time as the procedural rights accorded to the above communities could be adhered to.

[7] Paragraph 45.
[8] Paragraph 43(1).