GREETINGS FROM THE CO-CHAIRS

The Section of International Law's Spring Meeting in Washington, D.C. is just a few weeks away. Make your plans now to join us for five days of substantive legal discussions and invaluable networking opportunities. The International Energy and Natural Resources Committee is sponsoring two thought-provoking programs: "Renewable Energy Around the World: An Entrepreneur's Windfall or Big Solar Flare?" and "Fracking — An Alternative to Alternatives?". Both programs will provide a great opportunity to learn about the latest legal issues and to connect and build relationships with colleagues from around the world. See inside for more details about the two programs.

This issue of our newsletter also contains updates on recent energy developments in nine countries and three articles focused on Latin America, covering mining, indigenous participation, and environmental liability.

Are you interested in shaping the topics, activities, and direction of the Committee? We encourage all members to join in on our monthly planning calls, which are usually held on the second Thursday of each month. Look for the conference call announcement email on the Committee listserv, with the dial-in numbers.

Finally, thank you to the many people who contributed to the wide range of activities in 2012, including our conference calls, programs in Miami and New York, proposals for Washington D.C. and London, the newsletter, the Year in Review, collaborative efforts with other ABA entities, the Section's partnership with the World Bank, outreach to other organizations, such as AIPN, and more. A double thanks to the 20+ members who contributed to at least two of those!

See you at the Spring Meeting!

Mark A. Gould, Jr. and Renee Dopplick
Co-Chairs
International Energy & Natural Resources Committee

NEWS FROM THE COMMITTEE

As reported by our Co-Chairs above, the Committee has had a very productive past few months. In addition to the exciting projects you have read about, Committee members met in Miami in October for the Section’s fall meeting. We also continue to expand our base of partners both within the ABA and with external partners, such as the World Bank.
• **Section of International Law Fall Meeting 2012 in Miami**

Jeff Barnes and Saul Feilbogen moderated a very informative program on current opportunities and challenges arising out of mining projects in various Latin American countries, including speakers from Argentina, Brazil, Colombia and Canada. Networking events included events at the New World Symphony (with a wonderful rooftop view across Biscayne Bay), the historic Moore Building in Miami’s Design District, and the always popular and fun “speed networking” party. Although rains from a tropical storm offshore forced us inside from our original poolside meeting spot, members of our Committee also had a late night gathering at which we were able to meet some new members and put faces to the names and voices of those that we work with regularly on Committee conference and the always calls and projects.

• **ABA Section, Division, and Forum Coordination Team on Environment, Energy, and Natural Resources**

The Committee has been participating in a recently formed Coordination Team that seeks to facilitate coordination among all the Sections, Divisions, and Forums of the ABA that have an interest in environmental, energy, and natural resources issues. Its Sustainability Subcommittee currently is seeking approval from various ABA entities to go forward with a teleconference on renewable energy in 2013. We’ll keep you updated on the approval status.

• **ABA-World Bank Partnership: Sustainable Energy**

The ABA is a founding partner of the World Bank's Global Forum on Law, Justice, and Development. The Forum provides a permanent and open forum and online platform for various stakeholders to share ideas, best practices, relevant research, and experiences for the purpose of improving outcomes in the rule of law, justice, and development. The Forum is divided into five thematic working groups. Our Committee has been participating in the thematic working group focusing on environmental and natural resources law. There will be a forthcoming online network, known as a "community of practice," dedicated to sustainable energy. Our Committee has agreed to serve as a founding sponsor of the sustainable energy community of practice. We expect that online community of practice to launch as a formal effort in 2013. Once launched, the online community will provide new opportunities to connect with other energy experts around the world. Look for additional updates on the listserv.

• **Section of International Law Spring Meeting 2013 in Washington, D.C.**

Also, a reminder to everyone to make your plans now to attend the Section of International Law's 2013 Spring Meeting in Washington, DC from April 23-27, 2013. The conference, to be held this year at the Hyatt on Capitol Hill, includes several programs of particular interest to our Committee (described below), including one on the very hot topic of fracking, and a panel to update us on current issues facing "Renewable Energy Around the World." There will also be the usual array of exciting networking events, including lunches with speakers such as Justice Ruth Bader Ginsburg and a not to be missed evening reception at the United States Supreme Court.

As always, our Committee is planning a dinner on Wednesday evening, April 24, after that night’s reception, so that we can wine and dine together as we plan out our projects for the rest of the year. Stay tuned to the Committee listserv for more details on exactly when and where we will hold the Committee dinner.

To learn more about the meeting and to register, see [http://ambar.org/ilspring2013](http://ambar.org/ilspring2013).
Here are more details on our Committee’s sponsored programs:

"Renewable Energy Around the World: An Entrepreneur's Windfall or Big Solar Flare?"
Wednesday, April 24, 2013, 11 am - 12:30 pm
Primary sponsor: International Energy and Natural Resources Committee
Description: Growth in the renewable energy sector has skyrocketed over the past decade. Factors propelling this growth include rapid expansion of energy consumption; climate change and fuel security concerns; record oil prices; favorable policy environments, including subsidies; easy access to finance; and dramatic manufacturing and technology driven cost reductions. Renewables, however, could have a rocky road ahead. The financial crisis and reduced energy demand have impacted both access to finance and the willingness and ability of governments to support renewable technologies. Further, unconventional natural gas has lowered gas prices and abated fuel security concerns. Growth barriers may only be temporary though. This program will explore the sector through the eyes of an entrepreneurial investor’s attorney, sizing up the legal landscape for new projects. Counsel from around the world will discuss their regional legal, regulatory and policy climates as they compete to capture new renewable energy investment.

Moderator:
Roger D. Stark, Ballard Spahr LLP, Washington, DC

Speakers:
Mariana Ardizzone, Maciel, Norman & Asociados, Buenos Aires, Argentina
Chen Bao, Fangda Partners, Beijing, China
Keith Casto, Cooper, White & Cooper LLP, San Francisco, California
Chris Flynn, Gilbert + Tobin Lawyers, Sydney, Australia
Alex McLean, Arthur Cox, Dublin, Ireland

Program Chairs:
Caryl Ben Basat, BenBasat Law Group, P.A., Weston, Florida
Renee Dopplick, ACM, Washington, DC

"Fracking — An Alternative to Alternatives?"
Wednesday, April 24, 2013, 2:30 - 4 pm
Primary sponsor: International Energy and Natural Resources Committee
Description: New technological advancements in hydraulic fracture drilling and horizontal drilling have led to rapid growth in unconventional energy production. By injecting highly pressurized fluids into the ground to fracture rock formations, companies are tapping previously unavailable sources of natural gas and oil. In some markets, fracking is raising hopes of a new economic boom and major turnaround in domestic energy production. Yet, concerns related to possible seismic impacts, contamination of ground water, and health effects from air and ground pollutants have resulted in greater regulatory scrutiny, with some countries suspending and even banning the practice. With supplies of easily accessible fossil fuels dwindling, and renewable energies challenged by viability and scalability, can fracking provide an alternative energy revolution to meet current and predicted global energy demands? This panel will explore how fracking fits within the energy industry, international trade, and international environmental law.

Program Chairs:
Sacha Kathuria, Babst, Calland, Clements and Zomnir, P.C, Pittsburgh, Pennsylvania
Renee Dopplick, ACM, Washington, DC
April 25, 2013

Moderator:
Kenneth Komoroski, Fulbright & Jaworski LLP, Canonsburg, Pennsylvania

Speakers:
Wojciech Baginski, Siemiatkowski & Davies, Warsaw, Poland
Alex MacWilliam, Fraser Milner Casgrain LLP, Calgary, Alberta, Canada
Lizel Oberholzer, Bowman Gilfillan, Capetown, South Africa
Irina Paliashvili, RULG-Ukrainian Legal Group, PA, Kiev, Ukraine

In addition to those great programs, the Committee is also co-sponsoring the following panel on global water security:

“The Global Water Shortage: Crisis, Risk, and the Way Forward”
Thursday, April 25, 2013, 11 am - 12:30 pm
Primary sponsor: International Environmental Law Committee
Co-sponsor: International Energy and Natural Resources Committee
Description: In the weeks leading into the global summit on sustainable development, Rio+20, each and every country reported water as a top environmental issue. CEOs from The Coca-Cola Company, Pepsico, Levi Strauss & Co., Royal Dutch Shell, Unilever, and 40 other international companies called on governments attending Rio+20 to make global water security a top priority. Why is water receiving so much attention? As the human population hurtles toward 8 and 9 billion, increasing focus is being placed on the vital role water plays in agriculture and energy – 70% of global fresh water resources are currently used to produce food, and 15-20% is used for energy. Without access to adequate water, the economic systems of some countries will collapse and civil unrest will follow as food and water shortages become epidemic. As multinationals operate in countries that are experiencing or are expected to experience water shortages, how do they manage the economic, social and environmental risks? Are there legal avenues available to guide and protect them? This panel will highlight regions that face water risks such as Africa, China, India and the US-Mexico border, will describe how those risks are managed through practice and commercial agreements, and will discuss whether and how the risks are impacted by treaties and customary laws that are in effect.

Program chairs:
Renee Martin-Nagle, Environmental Law Institute, Washington, DC
Kim Smaczniak, Department of Justice, Washington, DC

Moderator:
Patricia Wouters, University of Dundee and Founder of the UNESCO IHP-HELP Centre for Water Law, Policy & Science, Scotland, United Kingdom

Speakers:
Joseph Dellapenna, Villanova University Law School, Villanova, PA
Peter Evans, General Electric, Atlanta, GA
Greg Koch, Coca-Cola Company and Managing Director, Global Water Stewardship Office of Sustainability, Atlanta, GA
Salman M.A. Salman, The World Bank, Washington, DC
• Welcome New Members!

We would like to take this opportunity to welcome all the new members who have joined our Committee in the past couple of months. These include:

Rick Beaumont                      Viren Mascarenhas
Sharon M. Beausoleil              Robbi Dawn Nagel
Allan Britton                     Angel Olivera
J. Anthony Chavez                 Claudia Isabel Oviedo
Christopher Gordon Cottrell       Bruno Piexoto
Mauricio Becerra De La Roca       Wolfram Rehbock
Roberta Donato                    Steven A. Rhodes
Sarah Mercer Farnham              Glenn Roberts
Jessica Elizabeth Hales            Yuliya Samorukova
Laura Ingabire                    Brett A. Sebastian
Aman Kakar                       Scott E. Shostak
Thomas Kirby                     Erick Soderlund
Sylviane Kouemo                   David Sofge
Janet Koven Levit                 Sara Vinson
Helen Liu                         Tobias Frederic Ziegler
Anna Martin

If we missed you this time around, please let us know and we will be happy to include you in the next issue.

• How to Contribute Newsletter Articles

We are dedicated to making this Newsletter a useful and productive benefit to your ABA membership. To do that, we need your feedback, suggestions and, especially, your contributions. We want to try to make this publication an informal and practical way in which to keep up with what is going on around the world in the area of energy and natural resources. As you can see from the content in this issue, articles and submissions cover a wide range of topics and can be short and to the point. Please send your ideas and submissions to the Editor, Mark Gould, at mark.gould@agg.com. We look forward to hearing from you in the near future!

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DATELINE

CHINA

Chinese officials are hopeful that large-scale commercial production of shale gas could begin in China within five years, despite continuing concerns over high costs and environmental fears. Although China recently put 20 shale blocks up for auction and received over 150 bids from 83 companies, many energy executives suggest that the nation needs to quickly improve its extraction technology in order to reduce cost inefficiencies. One obstacle noted by Chinese exploration companies is that the equipment used by the U.S., Canada, and many other nations that are developing their own shale gas fields is more suitable for flat plains and prairies; however, most of China’s known shale reserves are deeper underground and located primarily in more mountainous regions of the country. Also, China lacks an extensive existing pipeline infrastructure network that can efficiently transport production to the appropriate markets. In order to stimulate the industry, the Chinese Ministry of Finance recently announced a subsidy plan, offering 0.4 yuan per cubic meter of shale gas developed between 2012-2015. Additional incentives may also be available.
China National Offshore Oil Corp (CNOOC) has contracted with Royal Dutch Shell to explore for oil and gas in the South China Sea and off the coast of the West African nation of Gabon. Shell will bear the costs of exploration. CNOOC is able to claim an equity interest of up to 51 percent of any commercial discoveries made in the designated blocks. The move is part of CNOOC’s efforts to diversify China’s oil imports and maintain energy security in the future. Exploration is expected to take four to five years, at a minimum, partially because the blocks are deepwater assets, situated between 1,200 and 2,100 meters deep.

**TANZANIA**

The Tanzanian government has announced renewed interest in seeking out foreign investment sources to help the nation realize its significant energy and mining potential. Sospeter Muhongo, who was appointed in May, 2012, as Tanzania’s Minister of Energy and Minerals, opened the welcome mat recently for investors from around the world. Muhongo noted that his country does not have sufficient financial capacity of its own in order to adequately tap the abundant natural resources supplies of gold, lead, zinc, platinum, titanium, uranium and coal. In particular, Tanzania is looking to Chinese investors to back projects such as the recent funding by the Export-Import Bank of China of a $1.2 billion, 523 kilometer gas pipeline and a $3 billion investment by a Chinese group in coal and iron ore production in southern Tanzania. Other potential financing sources include Norway’s Statoil and France’s Total Group, which soon may begin exploration in the Lake Tanganyika area.

**JAPAN**

The Japanese Ministry of Economy, Trade and Industry has announced a recent breakthrough in attempts to successfully extract gas from offshore deposits of methane hydrate (also known as “flammable ice”). According to the Japanese officials, a scientific drilling ship was able to pipe gas to the ocean surface after drilling into a layer of methane hydrates lying about 300 meters below the seabed in an area located about 50 miles south of the Atsumi peninsula in central Japan. The drilling team caused the natural gas to separate from its encasement within the undersea hydrate reserve by using specialized equipment to lower the pressure. The breakthrough was thought to be a first of its kind as previous successful gas extractions had been from onshore methane hydrate reserves, rather than from under the ocean floor, where a substantial portion of the world’s deposits are believed to be located. Japanese officials were particularly excited as the vast undersea reservoir could provide a significant alternative energy source for a nation that is the world’s biggest importer of liquefied natural gas and that is trying to decide whether or not it can rely in the future on nuclear energy after the disaster at Fukushima.

**UNITED STATES**

At the inauguration ceremony marking the beginning of his second term, President Obama emphatically stated his desire to address climate change during the remainder of his presidency. “We will respond to the threat of climate change, knowing that the failure to do so would betray our children and future generations,” said the President. The exact efforts to take place include modernization of more than 75 percent of federal buildings in the next four years, as well as initiatives to encourage improving the energy efficiency of residential and commercial buildings across the country. Additionally, the Department of Energy recently announced up to $10 million to support research of biofuels created from algae. The funding is targeted toward projects that will demonstrate cost-effective production, harvesting, and processing technologies.

One issue likely to come up in the U.S. Congress in 2013 is the controversial 1700 mile Keystone XL pipeline, which runs from Canada's tar sands to Texas. The pipeline has support in the House of Representatives and from the oil and gas industry. Although environmental groups want to see it permanently scrapped, the U.S. State Department recently announced that construction of this pipeline itself would be unlikely to have a
significant impact on global climate change. This finding could pave the way for President Obama to approve the project. Opponents of the pipeline voiced strong opposition to the decision, however, and vowed to continue to fight the pipeline during the 45 day comment period running between formal publication of the State Department’s announcement and final administrative review, leading to the creation of a final environmental impact statement.

ROMANIA

Three new wind farms developed by an Italian renewable energy company now contribute to the Romanian power grid and will add 560 million kWh of energy annually once they reach full productivity. The projects, which are the result of an investment of approximately 340 million Euros, consist of 89 wind turbines in the Dobrogea region in the eastern portion of the country.

UKRAINE

A key step in the complicated and lengthy process of cleaning up the remains of the 1986 explosion at the former nuclear reactor in Chernobyl has been completed. Workers recently constructed the first section of what will ultimately be a massive arch cover for what is left at the plant. Once the structure is built and in place, workers can begin to dismantle the reactor and remove the lingering radioactive waste. However, before that can happen, the project's directors will need to determine the best method of removing the chimney without releasing its radioactive lining into the atmosphere.

At completion, the structure will be 843 feet high and 492 feet wide and will stand taller than the Statue of Liberty. The entire project has a budget of $2 billion, with the cover alone comprising $1.2 billion of that total.

FEATURED ARTICLES

MEXICAN MINING LAW UPDATE

By: René Mauricio Alva-Martinez, Bryan, Gonzalez Vargas & Gonzalez Baz, Mexico, D.F., Mexico (ralva@bryanlex.com)

Introduction.

Mexico is a country with almost 500 years of mining history and is one of the largest metal producers in the world. The mining industry represents a significant part of Mexico’s economy, with Mexico being well-known worldwide as one of the principal producers of silver, celestite and bismuth, as well as other metals and minerals such as fluorite, graphite, arsenic, antimonium, zinc, cadmium, lead, copper, salt and manganese. Even though 22 of the Mexican States have mineral deposits (the main mining States in Mexico are: Sonora, Chihuahua, Coahuila, Durango, Zacatecas and San Luis Potosi), Mexico still remains largely unexplored. Therefore, Mexico is known as a major destination for companies seeking exploration and exploitation of untapped mineral reserves.

Background.

When Spain ruled over Mexico, mining was subject first to the laws of Spain. In later years, new rules were enacted for their specific application in Spain’s colony known as New Spain (Nueva España), under which mines were considered Royal Property by the Spanish Crown. This tradition was kept until 1892, when Mexican mining law was reformed by ending the old dominance of Spaniards and European mine owners and
instead granting subsoil ownership to the actual landowners. This revived the mining industry in Mexico and also triggered the discovery of oil fields.

Mexican Mining Law is based on Article 27 of the Mexican Constitution (enacted in 1917), which allowed Mexico to regain direct control of the mineral resources in its territory. In other words, all minerals found in Mexican territory are owned by the Nation, allowing the government to grant concessions to Mexicans or foreigners to exploit minerals (with the exception of oil and nuclear fuel minerals).

Later, in 1961, Article 27 of the Mexican Constitution was amended to provide a stricter control of the mining industry in Mexico. It established that a foreigner could only hold up to 49% of the outstanding capital in companies that had concessions or permits to explore and exploit mineral resources. This development forced foreign investors to sell part of their companies or incorporate Mexican companies that complied with this new requirement into their ownership structure. As a result, the Mexican mining industry became less attractive to foreign capital.

**Current Legal Framework.**

Under the Mexican Constitution, minerals are part of the nation’s patrimony. The mining industry in Mexico is regulated by the Federal Executive Branch through four legislative enactments: Article 27 of the Federal Constitution, Mining Law, Mining Law Regulations and Mining Manual for Public Service, in addition to other legislation that is also applicable to the mining industry because of environmental, labor, health and safety, international trade, customs and tax reasons; and any mining activity carried out by a person or entity is subject to a Concession or Permit which can only be granted and issued by the Federal Government as explained herein below.

The Mining Law (hereinafter, the “Law”) is a federal legislation that regulates and controls all mining operations. The Law was enacted in 1992 and published in the Federal Official Gazette on June 26, 1992. On December 24, 1996, some of its articles were amended. The last amendment thereto was published in June 2006.

- **Concessions and Permits**

As previously advised, Mexico retains ownership to all mineral resources, and the rights to explore and exploit them are granted by the Federal Government through the Ministry of Economy (hereinafter, the “Ministry”). The Ministry is the authority responsible to grant, supervise, or cancel concessions, as well as to enforce the mining regulations. This includes the inspection of mining operations and issuing sanctions, if applicable.

The Ministry coordinates with the Mexican Geological Services, whose purposes are carrying out geological, mining and metallurgical investigations; identifying and estimating mineral resources; establishing an inventory of available mineral resources; and providing geological information as a public service. The Mexican Geological Services must provide to the Ministry an annual report regarding its geological and mining investigations.

There are two types of concessions:

- **Mining Concessions**: The mining concessions typically confer the rights to: explore and exploit a particular area; dispose of the minerals obtained; dispose of the terrain and water located in the concessions area; and transfer the concessions ownership to third parties. Mining concessions are granted for a term of up to 50 years and can be extended for one additional term of 50 years.
Mining concessionaires can obtain a permit from the Ministry of Energy to recover and exploit gas from the coalfields; however, such a permit is subject to the caveat that the use can only be for the concessionaries’ own benefit or it must be delivered to Petroleos Mexicanos. For such purpose, concessionaries also must execute a contract with Petroleos Mexicanos for transportation and delivery services.

- **Exploration Mining Concessions:** Exploration concessions confer the right to explore a certain specific territory in order to identify mineral deposits and to quantify their economic value. These concessions cannot be transferred and no lien may be placed upon them. The exploration concessions are valid for 6 years and cannot be extended.

- **Minerals subject to mining operations**

The exploitation of certain minerals is an exclusive activity of the Mexican Government and the Law specifically lists that the following would not be subject to a concession:

- (a) Oil and solid, liquid or gaseous carbon hydrogen, except for gases related to coalfields (these are subject to a monopoly under the Federal Government through its state owned company Petroleos Mexicanos);
- (b) Radioactive minerals;
- (c) Minerals dissolved or in suspension in underground water, as long as the same do not arise from a mineral bank different from the land’s components;
- (d) Rocks and the products therefrom that can only be used to manufacture construction materials or that are designated for this purpose;
- (e) Products arising from the decomposition of rocks, when exploitation is performed through open sky works; and
- (f) Salt arising from basins formed in endorheic banks.

All other minerals that are not provided in the aforementioned paragraphs can be subject to exploitation through a concession granted by the Federal Government through the Ministry.

Nonetheless, should there be a shortage or a national need to secure Mexico’s future supply of certain minerals, the Federal Government can establish a national reserve banning those minerals it deems appropriate from any and all mining concessions, including concessions then currently in force. Should the Federal Government desire to establish a reserve, it would need to do so through a Decree that must be published in the Federal Official Gazette. This is also applicable to Mexican territory that is declared to be a protected area for environmental purposes. However, this reservation by the Mexican Government must be justified. If there be a need to cancel concessions because of a shortage or national need of a certain mineral for the future, the Mexican Government would have to prove the circumstances by which it is being forced to cancel said concession and the concessionaire could request an indemnity as if its exploitation right would be expropriated. Under the Law the Mexican Government cannot cancel a concession without reason. Any such cancellation must be based on the specific cases outlined in the Law; otherwise, the concessionaire must be indemnified.

- **Concessionaires**

Now that we have established what minerals are subject to a concession from the Mexican Government, we can ask who is eligible to obtain mining concessions. As mentioned above, as of 1961, foreigners could not own more than 49% of mining companies. Thus, there was reduced participation by foreigners in the industry. As of 1990, however, Mexico amended its Foreign Investment legislation by opening the mining industry to foreigners once again. At first, foreigners had to hold ownership of the additional 51% through a trust;
afterwards (1992), the rules were changed once again and foreigners were authorized to hold 100% of a Mexican company involved in mining activities in Mexico. It should be noted that two types of companies are typically used in Mexico: the Corporation (Sociedad Anonima) or the Limited Liability Company (Sociedad de Responsabilidad Limitada), each of which can be wholly owned by foreign investment.

Additionally, companies that desire to obtain a mining concession must expressly state in their Bylaws, as one of the company’s purposes, that the exploration and exploitation of minerals and substances is subject to the Law. A proposed concessionaire also must have its domicile within Mexican territory.

- **Concession Requirements**

It is also important to analyze the conditions and requirements to obtain a mining concession. Concessions will be granted over a “free land” (as defined in the next paragraph) to the first person or entity that files an application that complies with all requirements. In the event that one or more applications are filed concurrently by different entities or persons, the Ministry must hold a bidding process to decide who will be granted the corresponding concession. Therefore, we can conclude that, under the Law, the rule of “first come, first served” governs the application and granting of concessions by the Mexican Government. There are certain benefits, however, that are provided to the native residents (Mexican Indians). For example, if the filed application requests a concession over a land located in an territory occupied by a native community or people, and the latter have requested concurrently (this condition is very important) with a different entity or person, the Ministry is obligated to grant the corresponding concession to the native community or people, as long as the application complies with the conditions and requirements provided under the Law.

How can we determine when an area is deemed to be “free land” for the purposes referred to above? This definition is provided under the Law (Article 14 thereof) and expressly states five types of “free land”: (i) zones declared as mineral reserves; (ii) mining concessions already in force; (iii) applications for mining concessions currently being resolved; (iv) mining concessions granted through a bid (and those arising therefrom) that has been cancelled, and (v) tracts of land over which a concession was not granted because the bidding process has been declared to be abandoned. For the situations referred to in clauses (iv) and (v) above, the Ministry will issue a resolution stating the terms and conditions for a new bidding. For those concessions that have been cancelled, the Ministry has the authority to declare the subject area as free land.

Another requirement for the concession is to have a right to access the surface of the land. This may be obtained directly through the purchase of the land or indirectly through a lease or usufruct from the owner thereof. This is possible or feasible when the land is subject to either civil or common law; however, in Mexico there is a special kind of land that is not governed by such law, but instead is classified as Agrarian Land (Ejido) and which is regulated by the Agrarian Act. This is a completely different regime that is sometimes overlooked by mining companies. Thus, it is imperative to go through a careful and detailed process in order to obtain the use and enjoyment of such land; otherwise this will represent a great risk for the mining company.

Also, it is expressly provided under the Law that all concession contracts (regardless of their classification as mining or exploration) and other actions related to mining must be recorded in the Mining Public Registry (in addition to other registration obligations of the concessionaries and the real estate).

- **Concessionaire Obligations**

Under the Law, all concessionaries have specific obligations that must be complied with during the entire term of a permit. These obligations include the need to execute and provide proof that the mining work is carried out pursuant to the Law and its regulations; payment of mining concessions fees; providing statistics, technical
and accounting reports to the Ministry; allowing inspection visits from the Ministry; complying with the Official Mexican Norms (commonly known as NOMs) and environmental regulations applicable to the mining industry; providing to the Ministry geology and mining reports in the event the concession is cancelled or transferred; notification to the Ministry of Energy as to any discovery of gas not associated with coalfields and information regarding the recovery and exploitation of gas that is in fact associated with coalfields; and delivery of all gas from coalfields to Petroleos Mexicanos in the location so designated by the letter, except for the gas used for its own operations.

In addition to the foregoing, it is very important for concessionaries to have knowledge of the mining regulations not only provided under the Law, its regulation and NOMs, but also local, state and federal legislation and regulations relating to the protection of the environment, such as the Environmental Balance and Environmental Protection Act, the Protection and Integral Management of Residues General Act, National Waters Act, Federal Regulations for Safety, Health and Environment in the Workplace. These laws impose many obligations that a concessionaire must comply with in order to avoid being subject to fines and penalties, as well as civil, labor and even criminal liability. Failure to comply also could cause the mining operations to be stopped or the concession permit to be cancelled.

- **Benefits**

Even though there are many obligations and/or legal provisions that a concessionaire must know and comply with, there are also certain benefits that a company from the NAFTA region (or other countries with which Mexico has a free trade agreement) can take advantage of, such as the import of machinery and equipment without paying import taxes or duties under such treaty regulations. Furthermore, the concessionaire may access Export Programs created by the Mexican Government (such as IMMEX and PROSEC) to enjoy Tax benefits and Duty impact relief. Another benefit is that there are no requirements for repatriation of products obtained from the mining concession, or a cap for exports; nor is there a restriction on foreign exchange.

**Conclusion**

As we can see, although there are many requirements that must be followed, the existing laws and regulations provide certainty for both the participants in the mining industry as well as the nation of Mexico. For industry investors and operators, it gives them a clear set of guidelines that, if followed accordingly, will allow an investment to be secured and protected under Mexican law. For the nation, it gives the Mexican Government and its people the opportunity to attract foreign investment providing jobs to its citizens.

**Sources:**
Mexican Mining Act (*Ley Minera*).
Regulation of the Mining Act (*Reglamento de la Ley Minera*).

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**2012 - THE YEAR CHILEAN PROJECTS WERE FORCED TO TAKE NOTICE OF ILO C-169**

By: Rony Zimerman, Bofill Mir & Alvarez Jana, Santiago, Chile (rzimerman@bmaj.cl)

During 2012, one of the principal issues affecting the energy and natural resources sector in Chile was the impact that the 1989 Indigenous and Tribal Peoples Convention No. 169 of the International Labor Organization (“C-169”) had on the planning, development and construction of energy and natural resources projects in Chile.
C-169 is an international convention regarding the rights of indigenous peoples. The agreement calls for the adoption of special measures to safeguard the persons, institutions, property, labor, cultures and environment of indigenous peoples and, in particular, establishes the right of indigenous peoples to be consulted in the planning of, and to participate in and benefit from, development projects (including mining and energy projects) which take place on land traditionally occupied by indigenous and tribal peoples. C-169 has been ratified by 22 countries, including Argentina, Bolivia, Brazil, Colombia and Peru in Latin America. Ratifying governments have the obligation of ensuring that C-169 is implemented in their country through the establishment of local laws and regulations.

The introduction of C-169 into the Chilean legal system has had a very significant effect, in a very brief period, on the way in which projects are being processed and approved. Chile ratified C-169 in 2008 and established an expressly temporary implementing law (Mideplan DS 124-2009). Indigenous groups quickly realized that C-169 had the potential to be a strong tool in their efforts to influence decisions regarding projects that they deemed affected them. The influence of C-169 grew significantly in 2012, however, after a series of court cases. In 2012, Chile’s Supreme Court rejected previously approved environmental permits for major projects such as Goldcorp’s El Morro project, as well as smaller projects such as the Proyecto Paguanta drilling program. Even clean energy projects, such as the Parque Eolico Chiloe wind energy project, were blocked in 2012, pursuant to the Supreme Court’s determination that the project failed to comply with C-169 standards.

In several of the noted cases, however, the project developers thought that they had, in fact, complied with the consultation process. This confusion was based at least in part upon the somewhat vague drafting of the noted temporary C-169 implementation regulation (Mideplan DS 124-2009). Therefore, in 2012, the Chilean government proposed new regulations to rectify any potential confusion by seeking to change the consultation process set out for the approval of environmental permits. In order to obtain an environmental permit in Chile for a project that may have an environmental impact as defined in the General Law on the Environment, a developer is required to present an Environmental Impact Declaration or Environmental Impact Study. The new proposed regulations seek to make environmental impact assessments mandatory for projects that affect indigenous peoples and to expand the consultation process requirements when their interests are involved. If approved, the changes could help clarify exactly what the consultation process with the indigenous population will consist of, and thereby give both private parties and the courts more guidance regarding when such consultation processes adhere to C-169 requirements.

Even so, however, the proposed regulations fail to address the issue of participation by the applicable indigenous communities, as distinct from consultation. Furthermore, the proposed regulations do not address in any manner the rights set out at Article 15.2 of C-169, which states that indigenous people shall “whenever possible participate in the benefits” derived from exploration and exploitation projects that take place on lands identified as indigenous lands. Finally, the native communities have presented numerous objections to the proposal, including the demand that the consultation process be undertaken independently, separate from the environmental permitting process, and that the process take place not only in relation to particular projects but also whenever legislation or public policy which may affect them is proposed. It is expected that the government and native groups will meet during the first quarter of 2013 to attempt to arrive at a consensus regarding these regulations.

Therefore, although the proposed new regulations may help, it would appear that there may be continued uncertainty regarding the implementation of C-169 in Chile, at least for the near term. The industry and
indigenous communities both would benefit from revisions that conform to international law and further clarify in better detail legal compliance requirements.

ENVIRONMENTAL STRICT LIABILITY IN ECUADOR

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This article deals with a novel legal feature: strict liability in environmental matters in Ecuador since the enactment of the 2008 Ecuadorian Constitution.

Ecuador is a developing country that is highly dependent on the exploitation of non-renewable resources. Following the guidelines contained in the 1972 Stockholm and 1992 Rio Declarations, Ecuador has progressively imposed more protective policies and stricter environmental regulations. An important milestone is the strict liability regime for environmental damage, introduced in the 2008 Ecuadorian Constitution. The strict liability regime in Ecuador is significant in its application to high-environmental impact activities such as the hydrocarbon and mining industries.

Ecuador is an advanced arena in the environmental battle. The enactment of the new Constitution in October 2008 brought many legal changes to the Ecuadorian environmental legal system. The changes broadly include: i) nature itself is a subject of rights; ii) indubio pro natura is a Constitutional rule; iii) strict liability applies to environmental damage; and iv) other amendments in general.

Such legislation has a significant impact on the sustainable development of certain industries, especially the hydrocarbons and mining industries. The constitutional provisions (e.g., Article 396) are broad and Ecuador has not yet implemented guidelines for application of strict liability to environmental matters. As a result, citizens and companies in Ecuador can face exposure to liability. Academics stress the need for the enactment of guidelines and limits on strict liability. For instance, Professor René Bedón Garzón states “Ecuador urgently needs the enactment of a procedural law that regulates certain still incomplete aspects as … the limitations to strict liability with purposes of making effective the sustainable development, as well as Tribunal’s competencies to sort damages, ordain remediation and restoration tasks, among others.”

European nations have previously developed the concept and rules of strict liability in environmental matters. The debates on the EU Directive 2004/35/EC on environmental liability clearly stated that “the optimum solution would be to have a framework directive, which would invoke strict liability on the part of persons performing an activity and authorize certain defenses as regards traditional environmental damage, and provide for fault-based liability in the case of damage caused to biodiversity by non-hazardous activities.” For example, these guidelines were clearly followed by Spain in order to reduce the arbitrary application of the

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2 Id. Art. 72. Unofficial translation: The restoration of nature is independent from the obligation that the State has to indemnify people that depend on the affected natural systems.
3 Id. Art. 396; Unofficial translation: […] Liability for environmental damage is strict. […]
law, to strengthen the rule of law and the principle of legal certainty. Under the law in Spain, the plaintiff is required to prove causation despite the strict liability regime.

Ecuadorian courts, however, have yet to set legal precedents regarding environmental strict liability. In recent years, courts issued only limited decisions differentiating fault-based liability and strict liability (i.e. *Delfina Torres v. Ecuador* and *Medardo Luna v. AECA*, which are not precedents of environmental strict liability). Those decisions were issued before 2008, however, and they do not address environmental strict liability; rather, they address only general civil liability. In the *Chevron Lago Agrio* case (the most publicized case regarding environmental damage), thirty thousand people sued TexPet (later acquired by Chevron) for environmental damage to water, soil and to the human population. The Court in *Chevron* awarded the plaintiffs damages for approximately US $18 billion by stating that TexPet failed to remediate the polluted areas, causing direct harm to the population. Even though this decision was issued in 2011, this is neither a strict civil liability case, nor an environmental strict liability case. Consequently, Ecuadorian case law provides little or no guidance regarding environmental strict liability.

In order to addresses uncertainty in the application of the environmental strict liability regime, it could be argued that the Ecuadorian government should enact laws and regulations that clearly set forth the elements of strict liability in environmental damage. By establishing specific elements, local courts and international tribunals will be able to create a “strict liability test” for every case presented for environmental damage, limiting subjective interpretation and application. A legal framework of this nature will help to balance sustainable development with environmental protection.

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1. Delfina Torres v. Petroecuador, Corte Suprema de Justicia [C.S.J.] [Supreme Court], Primera Sala de lo Civil y Mercantil, Expediente de Casación No. 20, R.O. No. 411, 1 de septiembre del 2004. (Ecu.).