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BIG INDUSTRY SMALL RULES. THE MINING INDUSTRY IN COLOMBIA

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Abstract:
This paper describes the Colombian legal framework applicable for the mining industry and identifies the problematic issues within and then proposes some straightforward reforms. To accomplish this objective the presents some information about the importance of this activity in the current political and economic setting and describes the fast growth of this industry as well as the influence of the global markets with regard to the needs of the mining activity. The paper proposes six basic reforms to adjust the legal framework to the current challenges of the industry.

Key words:
Mining, Colombia, environmental protection.

Resumen:
Este trabajo describe el marco jurídico aplicable en Colombia para la industria minera e identifica las cuestiones problemáticas de dicho marco para luego proponer algunas reformas básicas. Para lograr este objetivo, se presenta información sobre la importancia de esta actividad en el contexto político y económico actual y se describe el rápido crecimiento de esta industria, así como la influencia de los mercados mundiales en lo que respecta a las necesidades de la actividad minera. El documento propone seis reformas básicas para adecuar el marco legal a los retos actuales de la industria.

Palabras clave:
Minería, Colombia, protección ambiental.

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As an illustrative metaphor, Professor Jeffrey D. Sachs stated that roughly three big colonization processes could be identified that affected the developing world (Sachs 2001). In the first, European vessels in the XVII century came with people, in the second, mostly in the XIX and XX centuries, vessels came with goods to trade in the developing world, and now in the XXI century, vessels are coming full of money to extract the natural resources of the global south. In the past decades the interests of huge emerging economies, such as India and China, and the pressure of the global north to maintain its quality of life, has driven these economies to look for commodities around the world generating a transnational competition for natural resources (Rodriguez Garavito 2011).

The mining activity has gained enormous importance in Africa and Latin America as a branch of this need for commodities. Some countries have been in this track for a couple of decades and Colombia joined this road in the last decade with notable enthusiasm. In 2001, the Colombian legislative power enacted a new Mining Code designed to strengthen the activity in the country. However, lately, the rapid mining development has raised some questions about the institutional capacity to manage this industry. That is why it is important to halt inside this quick dynamic and reconsider the legal framework that controls it. This paper will identify the most important flaws of the current Colombian legal framework and will propose some direct reforms that tend to increase the level of control that the public institutions may have over the mining activity.

The paper begins under the presumption that mining, as an extractive industry, could lead Colombia to reach higher levels of macroeconomic stability, as well as economic development (Kauffman Task Force 2011). This paper does not question whether an economy based on extractive industry is a road to development, but it assumes that if the political decision has driven the country to that economic track, the society must has the best regulatory framework to acquire the best from this activity. Therefore, the objective of the essay is a reform to the current legal system, not a critique to the type of development that is sought out by the extractive model.[2]

The objective of this paper is to describe the Colombian legal framework applicable for the mining industry,[3] in order to identify the problematic issues within and then propose some straightforward reforms. To accomplish this objective I will divide the text in four chapters. First, I will present some information about the importance of this activity in the current political and economic setting. In this chapter I will describe the fast growth of this industry as well as the influence of the global markets with regard to the needs of the mining activity. Second, I will organize and explain the four stages in which the extracting process is divided in Colombia and five topics that deserve specific attention. Third, I will identify the weakness of the regulation in some of these stages, explaining the empirical as well as theoretical

[2] To explore the idea of a critic analysis of the extractive industries (Sousa Santos y Rodriguez 2005); (Shiva 2003); (Sen 2009); (Rodriguez Garavito 2011); (Sassen 2006); (Nussbaum 2010), (Andreassen y Marks 2010).

[3] In Colombia small-scale and large-scale mining have been identified. The legal framework is concentrated in the large-scale mining and therefore, the analysis presented will be concentrated on such mining. However, some problems such as forced displacement or overconcentration of land property are associated also with small-scale mining and particularly with illegal mining.

problems that have emerged. Finally, I will summarize six basic reforms that are indispensable to adjust the legal framework to the current challenges of the industry.

Chapter One: Economic Need for Mining

The world has experienced a rapid growth in its need for commodities. The expansion of emergent country economies, that implies a growth of demand, increasing in global population (ECOSOC 2010) and reducing the land available, are among the reasons for this tendency (UNCTAD 2011). This chapter will be divided in two sub-sections. First, the global markets of commodities, particularly metals minerals (most important mining sector in Colombia) and second, its impact and projections for Colombia as an exporter. These two subsections prove that the global market of commodities, particularly minerals, have a direct effect on the macroeconomic design and economic stability of Colombia. Even though Colombia is not a mining country that has based its production in the mining industry, it is a sector that has gained increased relevance and is becoming each day a more important production line on the national economy, and as such Colombia plans to become a mining country (Law No. 1450, 2011). In order to remark the special importance the regulatory framework that controls the industry has in Colombia's options to use the mining industry to reach levels of welfare comparable to emerged economies, it is important to portray the relevance of the increasing economic tendency of such industry at the national level.

The first element to mention is that since the last trimester of 2008 (after the beginning of the global economic crisis) the price for commodities has had extreme unstable changes (UNCTAD 2011). The metal prices went up almost 170 percent, while agriculture and food prices were 77 and 60 percent higher, respectively from 2008 (WBG 2011:2). Additionally, after the end of 2008, energy prices have increased more than double but still remain well below their former historic peaks (WBG 2011:2). The World Bank stresses that adverse weather conditions, whether it be droughts or heavy rains in many regions, has put pressure on coal and metals production (WBG 2011:2).

The industry demand in China, India and Brazil recovered the metal prices after 2009 and it is expected to have a 20 percent increase as demand recovers from the economic uncertainty and gets stronger (WBG 2011:2). These economies, particularly China, are in an intensive metal phase to guarantee its development (Cotula 2010). These forecasts may be intensified if current supply weather and markets constraints remain. The World Bank's "*Key Nominal Price Indices*" forecasts that for 2011 metal minerals indices would be at 406 in comparison with 337 in 2010 and 222 in 2009 (WBG 2011:2). The initial conclusion, in relation with metal minerals, is that the demand will continue to increase and it sends a clear signal to suppliers in Colombia.

The energy market also presents relevant information for the mining industry in Colombia. The first element to remark is that energy demand responds to the same dynamic already presented; developing countries and growing population will augment energy demands around the world (National Petroleum Council 2008). Fossil fuels will remain as the principal source of energy at least for the next twenty years (EIA 2011: 9). In 2008, oil represented around 34 percent of the world-marketed energy consumption and is expected to decline to 29 percent by 2035 (EIA 2011: 9). Gas represented around 21 percent of total marketed

energy consumption by 2008 and is expected to increase around 50 percent (EIA 2011: 10). Nuclear energy represents 6 percent of the total demand and renewable energies around 10 percent (EIA 2011: 10). Through the projections, coal remains as a strategic element in the global energy market, despite its environmental consequences. The regional demand of coal is and will be concentrated in Asia. Coal represents around 28 percent of the global marketed energy consumption but is expected to grow in a 1.5 average per year from 2008 to 2035 reaching total global consumption of around 50 percent (EIA 2011: 69). This information is extremely relevant for the Colombian mining industry.

Coal is the primary mineral of export in Colombia. It is expected that in non-OECD Asia, principally China and India, the annual consumption increase of the mineral will be around 2.3 percent annually (EIA 2011: 69). This means that by 2035 the total increase on coal consumption in non-OECD Asia will be around 65 percent (EIA 2011: 69). The tendency is that by 2030, the world primary energy demand will increase dramatically to a 40 percent higher than in 2007 (IEA 2009) and India and China represent 53 percent of that increase. These forecasts prove that a powerful pressure from the demand side of the equation is stimulating the market in Colombia to continue extracting coal and exporting it.

From the Colombian perspective, mining has become an important activity principally in the last decade, but its real impact in the macro economic level is expected in the coming decade. The national government expects that by 2014 the mining industry will represent 45 percent of the total foreign direct investment (FDI) and around 5 percent of the Gross Domestic Product (GDP) (WBG 2011). However, currently it only represents 2.5 (SIMCO 2012) percent of the GDP and around 25 percent of the FDI, just in second place after hydrocarbons (SIMCO 2012).

The Colombian production of minerals can be divided into three groups. First, production and export of precious metals, such as gold, that represents 5.5 percent of the total global mineral Colombian exports. Second, industrial minerals, like nickel, represent 7.5 percent of the mineral exports. Third, coal as an energy mineral, represents 87 percent of the total mineral exports of the country (Colombian Mining Statistics Yearbook 2009). The whole mining industry sector corresponds to roughly 24 percent of the total exports of the country (SIMCO 2012).

Without a doubt, the production of coal is by far the most important mineral that is currently extracted in Colombia. Coal in the economy ground, without global policies about systems of reduction of greenhouse gas (GHG) emissions, has rising potential in the global level. At this point in history, Colombia is the fifth largest exporter of coal in the world with a total of 75 million tons and it is expected to duplicate its production by 2020 (Viloria de la Hoz 1998). Between 2003 and 2009 the production of coal has increased by 39 percent with a 6.5 percent of annual increase (Colombian Mining Statistics Yearbook 2009). In 2009 coal represented 17 percent of the total exports of the country (SIMCO 2012), which corresponds to 39 billion dollars (Colombian Mining Statistics Yearbook 2009). In Colombia the mining activity and consequent extraction of coal is done almost exclusively for the international market, which is why 93 percent of the total production of coal in the country is exported (Mining-Energy Planning Unit 2012).

Finally it is important to emphasize the level of expansion of this activity in the last decade, in terms of territory, to understand its dynamic and the urgent need for assessment of its regulatory framework. In 2001 there were less than 500.000 acres of mining activity in the country, this was less than 0.5 percent of the total territory of the country. By 2008 the mining industry covered roughly 4 percent of the total Colombian territory with a land extension of 4.5 million (4'485.910) acres (Colombian Mining Statistics Yearbook 2009). The Ministry of Agriculture calculated that by the beginning of 2009 roughly five point five percent (5.5%) of the national territory is dedicated to mining, almost 6 million acres (Restrepo 2010). However, by the end of the same year, 2009, there were 8,44 million of acres with mining titles that represented roughly 7,4 percent of the total continental territory of the country (Rudas 2010: 50), and now this activity is developed in 25 out of 32 departments (local organization entity comparable with States in a Federal State).

However, the horizon presents relevant data that turns on some alarms in relation with the level of expansion of this activity in the country. By October 2010 there were petitions of mining titles for 40 million acres, which represent roughly 35 percent of the total territory of the country (Rudas 2010: 51). Taking into account that between 1994 and 2005 only 3 percent of the mining titles were rejected[4] in accordance with a study conducted by the 'Contraloría General de la Republica'[5], the expansion of the industry is undisputable (Rodríguez Becerra 2009). These petitions are analyzed by the mining authorities and do not imply automatic permission of exploration of exploitation of minerals. The expectations of increasing activity of the mining industry respond to the growing demand that was previously remarked at the beginning of this chapter. The data shows how the last decade has been an intensive period for the mining industry and that without a doubt it tends to increase its participation in the national economy, therefore turning its legal framework as a vital step in order to obtain social and economic revenues.

Chapter Two: Legal Framework for the Industry

Taking into account the economic relevance of the mining activity in Colombia, it is important to be aware of the legal framework that governs this activity. This chapter will be divided in two parts. First, there will be a brief introduction of the property regime for minerals in Colombia. Second, an organized explanation of the legal process to explore and extract minerals will be described.

The Colombian Constitution, in its article 332, defines that the subsoil is property of the State.[6] This legal definition immediately creates two different regimes of property; the first regime will be designed to regulate the State's property of the subsoil, particularly the non-renewable resources that can be extracted, and the second regime responds to the traditional logic of private and public property. The first element to address is the relationship between

[4] The rejection is the he final decision of the mining authority to not authorize mining activity in the described area. The decision can be based in exclusively two reasons. First, a pre-existent mining title that overlaps with the new petition. Second, the absence of requirements mentioned as irrevocable.

[5] The public institution in charge of the fiscal control of public resources.

[6] Colombian Constitution. Article 332. The state owns the subsoil and non-renewable natural resources, without prejudice to the rights acquired and perfected under prior laws. (Non-official translation).

these two regimes. This relationship has been controversial but has always been resolved under the concept of public interest[7], which characterized the interest of the State in the subsoil resources. Under the idea of public interest, any project designed to economically exploit the subsoil, that the State has authorized, will preempt the use of land that was currently developed in that territory. Thus the State will expropriate the properties needed to carry out the project.

The principal object of study in this chapter is the first property regime. This regime is also divided in two separate legal bodies. The first one regulates the exploration and extraction of oil and its derivatives (whose legislation is fragmented and dispersed[8]), and the second body regulates the extraction of minerals. This second body is Law 685 of 2001, the Colombian Mining Code, which concentrates all the relevant procedures and concepts for the mining industry. The Mining Code is the object of study in this paper.

The process to explore and extract minerals in Colombia has been divided in at least ten legal steps that can be organized in four major stages. The stages are: 1) the fulfillment of the general requirements of the mining concession contract, 2) the exploration, 3) the exploitation and 4) the closure of the project and abandonment of the territory. The paper is based on the first two stages because the preliminary control revels to be the most effective and in which more difficulties have been found.

In the first stage denominated concession contract, there are six steps that every proponent should follow. The first step is the acquisition of the application for concession contract. Second, once the proponent has the application, they must fulfill all the requirements defined in the application; this includes the identification of the territory to be explored, the minerals that can be found, among other elements that should be identified, and then submit the information back to the mining authority.[9] Third, the mining authority will do a technical

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[7] The Colombian Constitutional Court has addressed the overlapping of the traditional property over the land with the property that the Colombian State has over the subsoil and its non-renewable resources. The Court reached the conclusion that the interest of the State in the exploration and extraction of natural resources pre-empted the private and individual interest of the invidious that seen their property affected by the activity developed to extract the non-renewable natural resources. However, the Constitutional Court defines some limits that must be followed so the private interests yield to the public interest without and arbitrary action of the State. The first requirement is that the social progress of the community cannot violate human rights of the owner; therefore the taking must be compensated. This idea is developed in the decision C-891 of 2002. The second requirement is that the activities defined as activities of public interest or general interest are only defined by the legislative power. (Colombian Constitutional Court, Case C-491 of 2002). Finally, in case cultural minorities are in the territory two different paths must be followed. First, if there is a high impact project that can put in risk the physical and cultural integrity of the community or implies forced displacement, the public interest project must have their prior and informed consent, following the idea defined by the Inter-American Court of Human Rights, Case Saramaka People v Surinam 2007); *See also* Constitutional Court, Case T-769 of 2009 and 1045A of 2010). In case that is a regular project they must respect the right to previous consultation (Constitutional Court, Case C-030 of 2010).

[8] Different administrative regulations and statutes define its framework. The most relevant are two administrative regulations and one law. Regulation No. 1760 of June 26, 2003; Regulation No. 2288 of July 15, 2004; Regulation with Statutory Effects No. 1056 of April 20, 1953 modified by the Law No. 962 of Julio 8, 2005 and Law No. 1274 of January 5, 2009.

[9] The national mining authority in Colombia is the Ministry of Mines and Energy. However, the Ministry can delegate its authority to review the mining process to the local political authorities. Most of the Ministry's authority has been delegated to the Geological Institute of Colombia called Ingeominas. *See also*: Mining Code,

and legal revision of the proposal (Colombian Mining Code 2001). The Colombian authorities, under a strict interpretation of the principle of legality[10] and the article 4 of the Mining Code, have understood that the revision is exclusively about the fulfillment of the legal requirements in the mining field and any other consideration should not affect the decision. Four, In case that the fulfillment of the requirements is not adequate the mining authority will give thirty days to make the specific changes requested (Colombian Mining Code 2001, art. 32, 73, 275). Five, in case that the application is complete it has been understood that is an offer to contract with the State. Then the State accepts the offer and they go on to sign the contract.[11] As a consequence of the signed contract is what is called, the mining title (Colombian Mining Code 2001, art. 14). The title gives the concessionary the right to explore the defined area and oppose the title to other coming proponents and current inhabitants of the property in which the project will be developed. This title authorizes the concessionary to initiate the work of exploration and there is no legal requirement for any environmental permission or local authority authorization (Colombian Mining Code 2001, art. 48). The contract is valid for thirty years and can be extended for another thirty (Colombian Mining Code 2001, art. 70).

Once the mining title has been completed the exploration stage initiates. Chapter IV of the Mining Code regulates what is called "prospection", which has been assimilated to the general idea of exploration. With relation to this stage there are three steps to mention. First, the initiation of this exploration process can be done without environmental control by the competent authorities. It has been defined as a completely free process (Colombian Mining Code 2001, art. 39), except in territories owned by afro-Colombian or indigenous populations. Second, the exploration process is quite technical and it is almost exclusively crafted by geologists with the unique purpose of establishing the presence of minerals in the area. However, the mining law recognizes that the process can cause some damages, so it determines that a caution must be paid by the mining exploration company to the local authority in order to perform the procedure (Colombian Mining Code 2001, art. 40). This element will be important in the reforms that will be presented in the next chapter. Finally, during this process there is no option to request an easement because it is clearly defined in the law that the presence of the exploration teams is occasional and temporal (Colombian Mining Code 2001, art. 43).

In cases in which the exploration stage ends up in finding minerals, the proponent will initiate the exploitation process. Before the exploitation can start the project must have an environmental license.[12] This license, in cases of large-scale projects, includes all the specific permits that smaller activities would have to obtain separately. The most important are the permits to withdraw water, construction of infrastructure, environmental mitigation measures and final disposal of mining waste and hazardous substances (Law No. 99, 1993 and

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Law No. 685 of August 15, 2001, arts. 270, 320 and Law No. 489 of December 19, 1998 and Regulation No. 070 of July 17, 2001.

[10] One of the elements of the principle of legality in Colombia is defined as a restriction in which every public officer has to do only and exclusively what the law expressly authorizes.

[11] The contract has been defined as a concession contract that goes into the definition of development agreements or host agreements that has been subject of study in International law.

[12] The environmental license of these projects is a higly-contested issue that will not be addressed in this essay due to space restrictions and relevant to the objective of the text.

Regulation No. 2820, 2010). Once the environmental license is enacted the project may initiate activities. It is important to remark that the mining code excludes any other regulation to be applied to the mining industry (Colombian Mining Code 2001, art. 3, 4 and Case 339, 2002). During the process of exploitation the mining company will be under the control of the Ministry of Mines or its delegated authority, which usually is Ingeominas (Colombian Institute of geology and mining)[13]. In case of an unlawful behavior the mining authority can impose a sanction on the mining company under strict criteria defined in the Mining Code (Colombian Mining Code 2001, art. 83, 112, 115).

The final closure of the mine should be defined in the operational plans of the mine (Colombian Mining Code 2001, art. 84). Before starting the operation in the mine, the mining company should have presented a "Closure and Abandonment Plan", (Colombian Mining Code 2001, art. 84.11) to the mining authority. In the Mining Code it is understood that the closure of the mine is part of the operation of the mine and must be previously anticipated, regulated, and monitored by the public authorities (Colombian Mining Code 2001, art. 95). Because of the novelty of the mining industry in Colombia this has not been a highly contested issue until now.

With this legal framework in mind the next chapter will address some of the more complex issues around the mining regulation with the intention of proposing some legal reforms to mitigate certain problematic situations created by the legal scheme.

Chapter Three: Empirical and Theoretical Problems in the Mining Legal Framework

In this chapter, a more analytical and critical approach to the legal framework will be presented. As mentioned at the beginning of this paper, the mining regulation was enacted to abolish the fragmentation that the sector was suffering because of having dispersed sources of regulation that created legal insecurity. By addressing this issue the Mining Code was deigned to attract international direct investment. The Code only has ten years but it already has been subject to huge controversies.

This paper will present five of these problematic points with the intention of proposing a final reform, in order to mitigate the negative impacts that have been recognized.[14] First, the

[13] The Ingeominas is the Public Institute in charge of performing the basic examination of subsurface geological conditions of the Colombian territory to define the resource potential and constraints. Additionally, the Institute should promote the exploration and exploitation of mineral resources of the nation and participate, by delegation, in activities related to management these resources. The institute was modified by the Regulation with Statutory Effects No. 4131 of November 3, 2011 and now it has became the Colombian Geology Service (CGS). The CGS will have more scientific functions and the mining functions will in charge of the new National Mining Agency that will initiate activities in 2012.

[14] In the identification of legal problems, the problems that the mining industry is having with the extraction of minerals in minorities' territories are left aside, taking into account that it entails a completely complex issue that cannot be developed properly in this paper. It is important to have in mind that some of the problems that will be presented also have effect on these communities and therefore on their rights, who face even more complex dynamics in their relationship with the mining industry. However, I consider that the problems that do affect the cultural or racial minorities should be addressed with a differential focus; nevertheless that is not the object of this essay.

acquisition of the right to explore an area has stimulated internal forced displacement. In other words, acquiring a mining title is too flexible and it has been used as a threatening tool by illegal groups against small landowners. Second, the definition of areas where the mining activity is forbidden, restricted, or completely allowed not being taken into account by the mining authority is generating environmental degradation in strategic ecosystems and stimulating corruption in local and national authorities. Third, the lack of environmental control during the exploration stage generates local impacts not controlled by the public institutions. Fourth, the monitoring of minerals extraction and fulfillment of technical requirements is deficient. The amount of minerals extracted defines the royalties that the companies must pay and the public capacity to monitor this process is limited. Finally, the tax regime that is applicable for these companies arise distributional justice concerns.

a. The mining title:

In relation with the first topic, the problem is that the acquisition of the right to develop exploring and exploiting mining activities has generated a perverse collateral effect; internal forced displacement and unequal redistribution of the property on rural areas of the country. Particularly, illegal armed groups in Colombia have perversely used the legal structure to exercise unlawful pressure and coerce small owners of rural territories to abandon their properties (ElTiempo.com 2011).

The fundamental idea is that the mining activity has been defined in the Mining Code as a public interest activity and as such overlaps the zoning and property rights of the areas where mining activity will be developed. Even though the expropriation that the State does in favor of the mining companies, only takes place after the exploration has finished and the project has all the permits in place, the threat of legal expropriation arises as a latent heavy weight as soon as the exploring activities begin. The mining law preempts zoning, procurement, civil and commercial laws (Case C-339, 2002, art. 4) and has the direct potential of affecting property rights over the land where the projects will be developed. In addition, the mining law has been interpreted as a technical knowledge that should not be puzzled by considerations about social or environmental effects of the projects (Colombian Mining Code 2001).[15]

In a more concrete level, under the current legislation the documents needed to acquire a mining title are a Colombian ID and the definition of the area that is going to be requested for the activity, personal information but not even criminal records are solicited.[16] These legal provisions have as presumption the idea that exploring activities are low impact ones and that the uncertainty of posterior economic advantage does not warrant further procedures. Additionally, the principle under such concept is that whoever presents the project first in time will have privilege over the title and is the only person with whom the State can sign the contract, without taking into account his or her knowledge and preparation to carry out the needed activities. This legal structure has created a perverse collateral effect.

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[15] Congress debate previous to the enactment of the MINING CODE.

[16] It is important to remark that these requirements are different from those needed to sign the concession contract in which the legal requirement are more stringent. *See:* (UMPE 2011: 23).

Illegal armed groups have used this legal framework to carry out illicit finance and market tricks. Different public institutions, NGOs and international organizations, such as the United Nations, have warned the country about this trend (UNDP 2011). There have been identified two specific actions that have taken placed. First, the financing of illegal activities, and second, the creation of a black market of mining titles.

First, illegal mining activities carried out by illegal miners end up financing such groups. It has been estimated that around 50 percent of the mining activity of the country is illegal (ElEspectador.com 2011). Prices of commodities and the geographical constitution of the country generate that mining activity starts replacing drugs deals as a profitable underground activity that finance the actions of these armed groups (ElTiempo.com 2011). The internal armed conflict in Colombia can be categorized under the idea of "new wars" that the political theory of conflicts has developed (Kaldor 2001).[17] This newly constructed concept presents analytical elements that allows us to think the level of intervention that some economic activities can have as the fuel of civil conflicts (Gutierrez & Baron 2008), and therefore understands conflicts as economic activities driven by economic assumptions but with a different language (Keen 2000). Second, black markets of mining title have now been created, which end up legalizing illegal process of forced displacement. Due to their underground nature and procedures, the public authorities have been less capable of identifying these "black market" activities (Semana.com 2011). Illegal armed groups are applying for mining titles and use them to displace population with the threat of mining activity coming to the area and then negotiate the titles as legal rights (Colombian Constitutional Court, Cases Auto 004 & 005 of 2009). The mining title generates great fear in local populations because of the potential consequences that can imply, so it is used as a weapon to terrify the local inhabitants. As such, the mining title has been used to be in charge of extensive areas of the country creating a hidden dynamic of agrarian reform with unequal results (Racial Discrimination Observatory 2011).

Additionally, in certain occasions multinational mining companies has been involved in public media corruption scandals in relation with illegal activities related with the kind of forced displacement that has been described (ElNuevoHeraldo.com 2011). As an example of the negative links between multinational mining companies and illegal activities there has been special media coverage of the U.S. lawsuit against the Alabama-based Drummond coal company, accused of having close links to illegal paramilitary groups in Colombia and even the murdered of three local union leaders who opposed the expansion of activities of the company in the region of Cesar (TheMiamiHerald.com 2007). These episodes generate a cloudy environment in the national and international level.

The Colombian Constitutional Court has recognized, that during the last 10 years, the mining activity has become one of the challenges that the government is facing with regard to the massive internal forced displacement (UNHCR 2005)[18], especially for afro-Colombian populations the most vulnerable areas of the country (Colombian Constitutional Court, Cases

[17] The idea of new wars implies a series of non-conventional features such as the search for rents, links between criminal organizations and public officials violate against civilians and create underground economic effects.
[18] Colombia has the second largest population of internal displaced persons in the world of about 4 million people. See: (UNHCR 2005), available at: http://www.unhcr.org/464183723.html

Auto 004 & 005 of 2009). As an initial conclusion it is clear that the legal requirement for the mining title have been defined without taking into consideration the potential effect that the title could have on the rights of landowners in the rural areas of the country. The uncertainty generated by the legal entity of the mining title must be addressed.

b. Forbidden restricted and free mining zones:

The second set of rules that have been identified as problematic are those that define the three different areas in which it is possible to develop a mining activity. The mining regulation established areas where the activity is forbidden, restricted, or completely allowed. The Mining Code does not exclusively restrict the definition of areas where the mining activity is allowed. The Colombian Constitutional Court has stated that other sets of rules, such as environmental rules, that exclude other areas from the mining activity are also part of the regulation applicable to the mining activities.[19] However, the basic problem is that the definition of forbidden, restricted and available areas is not taken into account in the process of granting the mining title for exploration activities but in the moment of environmental license is given and the exploitation activities are to begin (Colombian Mining Code 2001, art. 3, 4). In addition, two different institutions carry out these two processes and in different times, generating contradictory signals to the mining explores, because they can have mining titles in areas where the mining activity will be forbidden. In conclusion, miners in the search for mining resources are exploring many areas of the country that are protected for environmental reasons generating a confusing horizon for the mining activity.

The idea behind the logic of the Mining Code is that the mining title is a different process from the environmental license, and therefore, the analysis of the environmental category or zoning of the area where the mining project is requested should not be included in the criteria that the mining agency should take into account to grant the mining title. Additionally, the mining code has a preferential condition over other sets of regulations due to the public interest involved in the activity (Colombian Mining Code 2001, art. 3, 4). The Colombian Constitutional Court found this interpretation in sync with the Constitution due to the principle of *lex specialis*.[20]

This dynamic produces three problems. First, it is generating economic pressure over institutions to define the environmental protected areas in a more restricted way in order to

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[19] The expression "in accordance with the preceding articles" is unconstitutional because it limits the exclusion zones and restriction determined strictly by the Law 685 of 2001, which is unknown constitutional limit imposed in Articles 333 and 334 of the Constitution, allowing indiscriminate exploration and mining areas that are not included in the Act. On the one hand, it ignores the laws that protect areas outside the national parks, regional nature parks and forest reserves, and on the another, closes the possibility that subsequent legislation will be enforceable to establish new areas of exclusion or restriction of mining, for environmental and biodiversity protection. Case C-339 of 2002, Constitutional Court].

[20] In this regard, the *lex specialis* approach under study states that facing legal disputes that arise between the State and individuals or between individuals with each other, in matters governed by Law 685 of 2001 (art. 2) one must perform a restrictive interpretation of general rules from other regulatory bodies, including environmental standards for the Mining Code. It is a wrong presumption mentioned by the plaintiff and the interveners, to believe that environmental laws are respected per se, although there is a subsequent rule that repeal or preempt legal standards on the environment.

allow more areas of the country for mining projects. Second, the mining and environmental institutions have been involved in corruption scandals due to the illegal expectation generated by the possibility of mining activities in environmental protected areas. Third, the mining activity is overlapping with other rural uses of land and therefore it is simulating new social conflict for land.

The first issue is the redefinition of protected areas. In this specific issue there are two types of areas that have been specially affected by the mining titles that overlap with their environmental protection. The first one is the 'paramos' and the other the 'Forest Reserve Areas'. Both legal protected areas have been defined as areas with strict limitations due to their environmental value and environmental services (Law No. 99, 1993).

At this point there are 120.000 acres that correspond to 6.3 percent of the total extension of the 'paramos' with mining titles (Rudas 2010: 53). This is an extremely sensitive ecosystem with a great characteristic, which is the production of clean water that ends up in the rivers of the country; now endanger by the mining activity (Humboldt Institute Colombia 2011). From the total number of 'paramos' in the world, around 57 percent of them are in Colombia (Humboldt Institute Colombia 2011). This tendency of mining titles in 'paramos' areas has been particularly problematic in the last five years; between 2007 and 2009 in over 52.000 acres of 'paramos' mining titles were granted (Rudas 2010: 53). This dynamic indicates the confused situation that has been described in this paper. Moreover, Colombia Law 2 of 1959 defined the most important environmental protected areas of the country under the category of 'Forest Reserve Areas'. This protection included areas of extreme environmental relevance such as the Amazon. Today there are 51.5 millions acres under this protection. By 2009, on 1.3 million of them had been granted mining titles, representing around 3 percent of these areas (Rudas 2010: 54). It is important to remark that from the 65 million of acres declared as 'Forest Reserve', already 13,6 million have been formally extracted from that category in order to economically exploit them (Rudas 2010: 54). This is the tendency that is stressed by the confused dynamic of granting mining titles in these areas.

It has been identified that the tendency of granting mining titles in such areas is a widespread fact and ends up in zoning changes in order to enable the mining activity. In 26 out of the 33 of the regional environmental agencies have changed the areas defined as 'Forest Reserve' in order to permit mining activity on them (Rudas 2010: 55). However, 70 percent of the areas with mining titles that has been redefined are concentrated in six regional agencies (Rudas 2010: 55). These areas of the country such as Choco, Uraba or Cauca have also been areas in which the State has been traditionally weak and social conflicts have been recurrent.

The second issue generated by the legal framework is that the uncertainty can drive the institutions to corruption. The problem presented is an institutional short-circuit between the environmental authorities and the mining authority that undermine the authority of both institutions and make them more vulnerable to illegal pressures (Sousa Santos 2009). The environmental regional agencies, as well as the local political authorities, are the ones that define the zoning of the areas through a tool called Organizational Territorial Plan (POT for it initials in Spanish). However, the mining authority grants the mining titles without environmental or zoning considerations due to the fact that it has been understood that the mining authority must make a technical decision, exclusively based on geological reasons and should not include environmental or zoning considerations (Colombian Mining Code 2001,

art. 3). This administrative lack of organization has been understood as a weakness of the public institutions and different agents have taken advantage of the situation (ElTiempo.com 2011). The problem has been so severe that many public officers of the mining agency (Ingeominas) are under criminal investigation (Inter-administrative Convention No. 0027, 2007) and, due to the irregularities, the current government has enacted a reform to remove from the agency the regulation of the mining industry (Caracol.com.co 2011).

Finally, the mining industry overlaps with agricultural uses of land that add pressure to already conflicted rural areas of the country. The United Nations Development Program (UNDP) in 2011 produced a report in which they stated "*To the traditional conflicts of land uses by the overuse in productive areas, it has been added another from the incursion of biofuels and mining in rural areas. The areas given in concession to exploitation of the subsoil can create conflicts due to overlapping of suitability soils for agriculture and those for mineral extraction*" (UNDP 2011: 43). The conflicted rural area of Colombia is facing an immense challenge with the emergence of the mining activity in the last decade. Today in Colombia the mining activity, with 8,44 million of acres with mining titles (UNDP 2011: 38), overpass the agriculture activity that is developed in only 5 million acres of the territory (UNDP 2011: 100). This tendency creates an urgency to rethink the legal institution of the mining title.

The misleading environment generated by the legal framework does not contribute to guarantee the legal security for international investors that was one of the basic principles of the mining reform in 2001 and also creates shortcuts and confusion that is used by some miners to take advantage of the institutions generating a detriment for the environment conditions of the country and the social stability of the regions were this puzzlement takes place.

c. Exploration process without environmental assessment

The third problem that is going to be presented in this paper is that there is not requirement of any type of environmental study or permission for the exploration process.[21] It has been argued that the effect on the environment is not severe enough under this process to justify such requirement. However, the absence of an early environmental assessment stimulates distrustful relation with the communities and local authorities and can put in real risk the environment. The absence of any environmental and social study in this stage of the project is an important lack that ends up in other problems that has been identified such as the forced displacement and local violence in the areas where the mining activity comes.

The mining activities are high impact activities by definition because of its pure nature (UNDP 2011: 53). Even the exploring process is not mechanically too demanding, it is a process that stresses the communities in the areas of the projects (Duruigbo 2006). The latent

[21] Even though the Colombian Constitutional Court in certain rulings has remarked the importance of the environmental assessment of this process, the current legislation does not require any environmental impact study about the exploration process and it has been interpreted as *obiter dicta* but not as *ratio iuris* in any of the case in which the topic has been discussed. See. Case C-339 of 2002, Case C-442 of 2009, and Case T -769 of 2009 Constitutional Court.

possibility of a mining project and thereby expropriation, displacement, lost of social roots, uncertainty, new investment in the area, creates a sensation of cultural and social rupture that goes in a parallel way with environmental assessment that must be done at some point of the project (Rodriguez Garavito 2011: 260-270.)

Two facts exacerbate the level of intensity of this activity particularly in the context of Colombia. First, Colombia has a long history of poor allocation of property rights, particularly in the rural and semi rural areas of the country. Some historians and sociologists have traced this weakness back into the colonization era in where the real titles were enacted in order to stimulate the colonization of far regions of the country, in which the allocation of property rights went out of a central power generating massive non state control over the land (Fals Borda 2005). Others have identified the fights to the right to land as the fundamental element of the internal armed conflict that Colombia has lived in the last sixty years (Kalmanovitz 2001). In truth, in the second part of the 20th century, some efforts were directed to reconfigure the land property and set a system of clear allocation of property rights. However, these processes have failed (UNDP 2011: 53).[22] Big landowners have concentrated the property in a few hands, a phenomenon that has increased in the past decade instead of being reverted. Today, Colombia is one of the must unequal societies in the world with a Gini Index of 0.84 of property concentration (UNDP 2011: 200). This fact is reflected in the possession of land, particularly in the rural areas of the country, in which 1.15 percent of the landowners in Colombia posses 52.2 percent of the property in the country (UNDP 2011: 51). This background evidences that the fight for land and its relevance in the everyday life of the rural inhabitants of the country, is a particular factor in the Colombian context that implies that the mining industry, by its nature and potentials, is a high impact activity from start to end.

Second, the structure of the industry generates a triangle relationship in which the communities feel that the public institutions are supporting the interest of the investor and their rights are not being taken into account. This phenomenon is particularly common in the extractive industries (Vadi, 2011: 797). The general sensation that local communities have when projects are proposed and structured by agents outside their communities is magnified in the mining field. Multinational corporations carry out most of the large-scale mining. As it has been mentioned, one of the objectives of the modification of the Mining Code in 2001 was to attract foreign direct investment in order to explore and exploit different regions of the country. The multinational companies deal directly with the national government due to the scale and dimension of the projects,[23] and as a result, the perception of the communities is

[22] The United Nations Development Program in their 2011 report defines six elements why the process of rights allocation and redistribution of the land in the country has failed. (Free translation) "(a) The failure of agriculture reformism in the decades of 1960 and 1970, that thereby exacerbates the problem, (b) the weakening and stigmatization of organization and mobilization of the peasantry, (c) attempting to replace the land reform by policy of market was clearly insufficient given the magnitude of the situation; (d) the expansion and escalation of armed conflict and three of its effects: concentration of land ownership, extreme victimization of the peasantry and, forced displacement and dispossession of land, (e) The overrepresentation and influence policy owners in various scenarios of decision making on the future of the sector, and (f) lack or inadequate of information to identify the problem, submit it to public debate and a consensus to intervene on their solution".

[23] The environmental license process for large-scale mining activities used to be in charge of the Ministry of Environment, Housing and Territorial Development but the government just made important changes in the structure of the State and the environmental license passed to a new agency called The National Agency of

that they are not being represented by the national government. National public officers are more concentrated in stimulating a secure and clear panorama for multinational corporations than in the particular worries of local communities. In addition, the local authorities, the natural interlocutors of local communities, lost their power in the large-scale mining projects generating a sensation of orphanhood in the local communities. This fracture, in the levels of negotiation and practical impact, generates fear and distrust that may end up stimulating social conflicts. The absence of previous approaches to craft the spaces of dialogue with the communities have created deep social impacts (Colombian Mining Code 2001, art. 40).[24]

As conclusion, it is clear that the mining industry has at least two remarkable characteristics in the Colombian context that makes seriously problematic the idea that the mining industry is not a high impact activity in its exploration stage and therefore its does not need any environmental license or even disclosure of the project to the communities in which it will be developed.

d. Public capacity to control the industry:

The fourth problem that has been identified in the defined legal framework is that the Colombian government has no public officers to control the amount of minerals that the companies extract. The only system to control the amount of minerals extracted is the balance that the company does at the exit of the mines (UPME 2011: 4). The lack of control has generated public debates about the real amount of minerals that have been extracted and therefore lately there have been some public scandals around the amount of royalties that the mining companies are paying. In relation with this issue it is important to remark two different problems. The first is the lack of public capacity to control and monitor the mining industry and the second, the distortions that the lack of institutional capacity generates in the payment of royalties.

By January 2011 the Colombian Minister of Mines went before Congress to explain the current situation in the mining sector. In the debate, the Minister recognized that the public entity in charge of controlling the mining sector, Ingeominas, does not have the capacity of covering the whole sector. Ingeominas (Ingeominas 2011) has 16 public officers to control 6000 legal mines (ElEspectador.com 2011). In 2011, each of these officials should have carried out 375 visits per year, which implies around two per day every working day for a year. This amount of work is impossible if we take into account the complexity of the process, as well as the geography of the country, among other factors. For example, by June of 2011, the working group of Ingeominas in charge of monitoring the mines during the six months period undertook 68 visits (Ingeominas 2011), far from the capacity required by the current industry. Additionally, by October 2011, the Minister of Mining recognized that there are 9000 legal mining titles that have aggravated the lack of institutional capacity. This scenario does not take into account that roughly half of the mines in Colombia are illegal and are not under this official control.

Environmental Licenses (Law No. 1444 of May 4, 2011 and Regulation No. 3570 of September 28, 2011 and 3573 of September 27, 2011).

[24] Environmental impacts are not common in the exploration stage however they can occur. This is why a caution is required for the exploration otherwise it will not be required.

Another problem in relation with the lack of capacity, is that Ingeominas is not only in charge of controlling the mechanical operation of the sector but also they are suppose to be in control of the royalties that should be paid by the mining companies (Colombian Mining Code 2001, art. 227). Ingeominas lacks the institutional capacity to fulfill this operation but also the technical knowledge to analyze and contrast the private information given by the private companies and the public databases.

The clear lack of institutional capacity to control the sector has raised serious questions about the amount of minerals that are extracted and also about the destination of the funds managed by the Ingeominas. Two sets of worries have reached the public media. First, the amount of taxes paid by the mining companies in relation with what is called 'canon superficiario' that is basically the surface rights that the owner of the mining title must pay, not for carrying out activities, but for having the concession of a certain amount of territory. The 'Contraloria General de la Republica' has been investigating potential patrimonial undermining of about 60 million U.S. dollars in 2011 (ElEspectador.com 2011). Second, in relation with the royalties paid by the mining companies, on one hand, the mining companies have recognized that they owe royalties to the Departments (direct royalties) (Portafolio.co 2011), on the other, there is a social awareness about conflict numerical differences between what the companies are paying and what they should pay, difference that is under investigation by the public authorities (ElEspectador.com 2011).

Additionally, it is important to remark that, parallel to the mining regulation, the most important control to the mining sector is exercised by the environmental institutions.[25] The structure and possible reforms of the environmental system is not the object of this paper, nevertheless it is important to stress that in the last decade this system has experienced serious cuts in the budget that make more feasible the lack of regulation of the mining sector. The financial viability of the sector is directly proportional to the institutional capacity to carry out its functions. At the national level, in 1998, the budget allocated by the central government to the environmental institutions was around 0,7 percent of the National Budget, but after the year 2000, this share is reduced to almost a third of that achieved in the early years of the National Environmental System to levels around 0,2 percent (Rudas 2010: 11). The scarce budget of the environmental institutions must be added to the deficiencies of the mining ones.

e. Royalties and Tax Exemptions:

The government has developed some strategies to attract direct foreign investment.[26] One of these strategies is tax exemption. Generally tax exemptions have been defined as effective formulas that "Host States" can use to create a more attractive investment environment (Viard 2011: 179-185). This strategy has proven to be quite effective, however, the problem is

[25] In 1993 the Colombian government created the SINA Sistema Nacional Ambiental [The National Environmental System]. The system has been defined as the group of institutions and principles that governs the environmental protection at the central, regional and local level.

[26] The most important laws have been the Law No. 863 of December 29, 2003 and its modificatory Law No. 1370 of December 30, 2009.

that the exceptions are too high and it generates a distributional justice problem that will be analyzed with base on the data available for the year 2009.

The mining sector has a special regime to attract foreign investments (UPME 2011).[27] In relation with the income tax, the mining sector received a tax exemption of about 1.8 million U.S. dollars (Rudas 2010: 56). Taking into account that for the year 2008 the total payment of taxes should have been about 3.3 million U.S. dollars (Rudas 2010: 57), it is clear that for the year 2008 the total exception for the income tax was just for 49 percent (Rudas 2010: 57) of the total that the State was supposed to receive. This scenario is product of increasing exemptions in taxes and royalties in the last years. Instead of consolidating a reduction regime of exemptions, the National Government has increased the percentage of exemptions. To illustrate this argument, we can compare the royalties and tax payments received by the Colombian government in 2007 and 2009. In the year 2007, the Colombian government received 5.6 million U.S. dollars (Rudas 2010: 58) for concept of royalties and taxes payments and in 2009 the sum was of about 5.3 million U.S. dollars (Rudas 2010: 58). Taking into account that the nominal increase of extraction from 2007 to 2009 was 30 percent (Rudas 2010: 58) it is clear that the level of exemptions is producing serious doubts about the advantage that the Colombian society is receiving from the increase in the mining activity.

Particularly the strategy of tax exemptions to attract foreign investors could have been relevant a few years ago when Colombia was just beginning its expansion in the mining sector. However, the current situation is creating distributional justice issues that must be addressed. The exemptions must fulfill an objective and have to be understood as an incentive that the government is providing to a specific sector and individuals above others. A tax exemption is a particular distribution of scarce resources of society that implies privileging some activities over others. Distributional justice considerations must be put under deliberation when this public policy decisions about tax are made (Benshalom 2010: 27).

Chapter Four: The Reforms

The reforms to the legal framework are divided in the same order as the problems identified in chapter three. The first reform is called conflict free requirements. The second is the creation of an inter-institutional commission to define mining titles in restricted or forbidden areas of the country. Third, the addition of environmental impact studies in the exploring stage. Fourth, the creation of a new office in the Ministry of Mining that has the main task to verify the amount of minerals extracted in the country. Fifth, reform the taxation law to adjust the tax regime that is applicable for the mining industry. Sixth, the privatization as recognition

[27] In the body of the text I will only analyse the income tax for being the most economically relevant. However, the especial regime of the mining industry includes at least other five tax exceptions. 1) 7 percent deduction in the VAT (Value Added Tax). 2) No taxes over the gasoline or diesel. 3) No taxes over importation of capital investment goods. 4) There is no obligation to repay the country foreign exchange foreign currency sales of some products. 5) Ability to enter and pay in foreign currency contracts. 6) Mining investors can take advantage of the opportunity to ensure clear rules and stable normative terms, through the signing of legal stability contracts with the state.

(Rose 2005-2006: 5), in terms of becoming formal property like that of traditional small mining, which are currently under illegality, jeopardizing the environment.

The proliferation of mining titles around the country must be strictly controlled and in some areas stopped. At this point the decision of expanding the mining activity has transcended the "technical analysis of geological conditions" to become a national concern. Therefore new elements of public policy must be added to the mining regulation. The first element is what I call "internal conflict free certificates" (ICFC).

The first place in which the State should start its careful review is on conflicted areas of the country, in order to avoid illegal displacement as well as help reduce the black market of mining titles. A strategy used in other countries has been called "conflict free certificates" (Global Witness 2000),[28] which have been used for countries immerse in severe civil wars (Efrat 2008). Such an institution could be extrapolated to the Colombian context, specifically to the mining field, of course, in a minor scale and only in certain areas of the country.

The crucial idea is that the Colombian government has a clear map of the most conflicted areas of the country in which forced displacement has been predominant, illegal groups have been identified and the presence of the State is fragile and therefore the population and local authorities are more vulnerable to undesired waves of mining activities. An additional element to classify these regions is the poor allocation of property rights (Wexler 2010). In these areas, usually there are no clear lines of ownership, therefore hindering the property rights. In these areas the mining activities must be stopped immediately. The government must retake control of these areas, not in the military sense but in an institutional one (Whittemore 2008: 423), in order to canalize through the legal mechanisms the mining development. These areas will only have mining activity once the national government enacts the "internal conflict free certificates".

In the current legislation there is an article that has been forgotten that could be used to promote this new reform. The article 33[29] of the Colombian Mining Code establishes that for reasons of national security, the government may define areas in which no proposals of mining activities may be submitted or contracts awarded on all or certain minerals. Even, the forced displacement and irregular allocation of property rights have not been recognized as national security reasons it is arguable that the level of conflict and overwhelming dynamic of the mining industry may justify the regulation and application of this article to reduce pressure in certain socially vulnerable areas of the country by eliminating mining activity until the social conditions are altered.

The second reform is the creation of an inter-institutional commission to define mining titles in restricted or forbidden areas of the country. This proposal is not a legal concept reform but an institutional requirement. This proposal is in fact quite simple, the problem identified is a short-circuit between environmental agencies, scientific institutions and the mining authority that is jeopardizing environmentally sensitive ecosystems. Each of these entities

[28] (Global Witness 2000), available at: http://www.globalwitness.org/media_library_get.php/

[29] "National Security Areas. The Government may set only for reasons of national security, zones within which no proposals may be submitted or award contracts on all or certain minerals. This reserve will be in effect while, in the opinion of the Government, the circumstances that he or she was setting. (...)" *Free translation*

performs their duties in an isolated path. The idea is to create an inter-institution committee with participation of the three parts that is in charge of analyzing the provision of mining titles in environmentally sensitive areas such as Forest Reserves. The reforms proposed that an inter-sectorial office or committee will be able to analyze the mining potential of certain difficult cases taking into account scientific and environmental information about the location of the areas and the level of vulnerability of its ecosystem. This committee would not be in charge of all the mining titles but just for the cases in which environmental protected areas or sensitive areas can be jeopardize by the mining industry. This committee must be an independent body capable of denying mining titles based on scientific knowledge. This institutional structure will allow the State to reduce the lack of communication between their entities and therefore stop the confusing signals sent to local inhabitants and multinational corporations interested in Colombian minerals.

The third reform has two edges, first an additional requirement in the mining process and second and additional obligation on the environmental institutionalism. In the previous section it was identified that the exploration stage has social and environmental effects that cannot be omitted by the State. Therefore this initial stage of the mining process requires what I will call a "socio-environmental initial license" (SEIL). The idea behind this license is to strengthen local governance and mitigate the negative impacts associated with extractive industries at the local level. The lack of participation of local agents in the extractive industries sector has been identified as one of the most important failures in the general structure of these projects and it is imperative to guarantee sustainable development and less conflicted projects (MacKay 2004).

Mining industries, as part of what can be defined as extractive industries, are high impact activities by definition. The SEIL process would reduce the level of uncertainty in local inhabitants and open a first stage of discussion and socialization. This license must be completed before the exploration stage begins, allowing the mining company to share the initial planning of the project with the local communities and even modify it in order to have the local consent as part of the initial structure; this space is not part of the extracting process today. The license proposed (SEIL) would not analyze the impacts of the project in its exploitation stage but the socio-environmental impacts of the exploration activities on the local inhabitants and the possibility of a future mining project in their territory. This license opens a space for public institutions to have a clear and transparent dialogue with local communities in stages of the project in which the local inhabitants can participate and not have the sensation of imposition of completely designed external projects.

The exploration stage today is a geological analysis that provides the fundamental information with which the project will be designed. However, the geological factors are not along in the territory. Social attachments with the land, traditional uses of the land, history of the allocation of property rights and other factors, would be present in every project and territory. The territory is not an empty source of natural resources; it is also a way of livelihood for peasants and traditional workers of the land. The level of uncertainty created by the mining industry in the organization of land in certain regions of the country must be reduced and the professionalism and proper behavior of the mining companies must be under control before the exploitation stage begins.

In 2006, the Colombian Constitutional Court ordered that the environmental license must be extended to the exploration stage in the cases where mining projects overlap with traditional uses of land by native minorities, such as indigenous population or afro-Colombian people.[30] The Court has extensively addressed the tension between the extraction of natural resources and the rights of minorities (Bonilla 2005). However, the proposal in this paper, is that the level of impact of the mining industry, which has been previously described, is reason enough to extend this requirement to all the projects, as such opening the opportunity to all local inhabitants to be aware of the mining projects from its gestation. Until now, not even the environmental license for the exploration stage in minority territories has been applied.

At the international level, an additional element enforces the idea of a socio-environmental initial license. There is a global awareness rising above the impact of extractive industries and biodiversity. As part of the Convention on Biological Diversity, there is a working group reviewing its implementation. In its strategic plan 2002-2012, the Working Group on the Review of Implementation of the Convention (WGRI) has remarked the importance of mitigation and control of extractive industries in the global biodiversity (Convention on Biological Diversity 1992). As part of this trend, the International Council on Mining and Metals (ICMM)[31] has analyzed the level of impact of the mining industry and biodiversity. Its report, "*Good Practice for Mining and Biodiversity*" (2006), suggests the clear need of environmental assessment in the exploration stages (ICMM 2006: 24-26). This global tendency to protect the biodiversity is imperative for Colombia, taking into account that it is one of the most biodiverse countries in the world, hosting close to 14 percent of the planet's biodiversity (Convention on Biological Diversity, Country Profile: Colombia 2012).

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[30] Before 2006, the Colombian Constitutional Court spoke of the obligation of prior consultation with the communities, "*each time providing a measure, legislative or administrative, which has the virtue of directly affecting the ethnic groups living in its territory.*" Based on the general obligation stated above that recognizes the Constitutional Court, and understanding that the exploration license is an administrative act liable to affect the communities, in ruling T-880 of 2006, the Constitutional Court held that "*having set the obligation to consult the Indigenous and Tribal Communities the measures that may affect them, especially those having to do with the delimitation and exploration of natural resources in their territories, in order to preserve their cultural, social and economic integrity*". This ruling was about oil exploration, more specifically, the establishment of an oil well, for this, the impact of the initiative was never denied. However, the exploratory analysis in cases of mineral extraction was not resolved until 2009.
The first statement of the Constitutional Court, in relation to mineral extraction of natural resources is the ruling T-769 of 2009. This statement defined that "*there is a close relationship between the territory and the cultural and economic survival of communities settled there; the violation of the right to consultation on exploration projects, also implies the violation of other rights of such communities, such as social and cultural autonomy and integrity, as well as ownership of their ancestral territories* ". It is clear from this statement that it is impossible to think that there is no involvement of indigenous communities in the exploration stage of mineral natural resources. This essential idea in the protection of the integrity of indigenous communities was restated in the ruling T-129 of 2011. In conclusion, the Constitutional Court has already recognized the obligation of prior consultation in the exploration stage of natural resources. However, it is a precedent in the making, which has been criticized harshly by both Colombian State entities, including the Ministry of Interior, as well as by individual companies (Ruling T-769 de 2009, Constitucional Court).

[31] The International Council on Mining and Metals (ICMM) was established in 2001 to improve sustainable development performance in the mining and metals industry. Today, it brings together 21 mining and metals companies as well as 32 national and regional mining associations and global commodity associations. See: (ICMM), available at: http://www.icmm.com/

A comparative example of a country with a requirement for the exploration stage is Brazil. In the Brazilian legislation there is a preliminary environmental assessment or license. In the legislation the institution of the preliminary license (LP) is granted in the planning stage of the extractive projects. They have three types of license that follow the projects through their life in order to balance the different levels of impacts that the stages could have (World Bank 2008: 20).[32]

The fourth reform is the creation of an office or special team who would be in charge of controlling and verifying the amount of minerals and royalties that the mining companies are paying. This team should be a public initiative, independent of the private information. It must be a regulatory body with enough power to monitor and control the private industries. It was proved that the geological institute in Colombia (Ingeominas) does not have the technical knowledge and institutional capacity to carry out this function. Therefore, the need for a new space in the public administration to control the most important information that the State should have about the mining process is a crucial requirement. This office must have the technical knowledge and personnel capacity to control the amount of minerals extracted in the mines and the amount of minerals exported by the mining companies without exclusively relying on private information. This dual task must be a priority to prevent, in the public scenario, the notion of an extractive industry bleeding dry the natural resources of the State. The lack of control in the extractive process may create parallel markets of smuggling with minerals at the national and even the international level (Wexler 2010).

The fifth reform is a modification of the tax regime. In this proposal the underground idea is that distributional justice analysis in the revenue structure is vital to avoid the natural curse and until this moment it has been absented (Duruigbo 2006). By the end of 2010 the Colombian government created a " trans-generation fund" in order to protect the royalties that are currently coming into the country so future generations can also take advantage of the natural resources (Law 756 of 2003). This formula has worked in countries such as Norway and Australia and it is expected to be an important reform in the Colombian legal system. In addition the Colombian government created an "inter-regional fund" so an improved national distribution could be reached. However, the real problem is in the amount of money that the extractive industries are paying for the natural resources they are extracting.

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[32] The National Environmental Policy stipulates the need for environmental licensing of potentially polluting activities. This provision has attracted a great deal of attention from the public authorities over the past _6 years, particularly with regards to large-scale investments. The Federal Constitution established that an Environmental Impact Assessment (EIA) and a corresponding Environmental Impact Report (RIMA) must always precede licensing whenever works or activities can potentially cause significant environmental impact. Federal Decree No. 99274/90, complemented by CONAMA Resolution n° _37/97, set forth the three-stage process for the issuing of licenses as follows:

a) A Preliminary License (LP) is granted during the preliminary planning stage of a project for a maximum five-year term. The license signifies approval of the location and design of the project, certifies its environmental feasibility and establishes the basic requirements and conditions to be complied with during subsequent stages of implementation.

b) The Installation License (IL) authorizes the installation of the development in accordance with the specifications contained in the approved plans, programs and projects, including environmental mitigation provisions and other conditions.

c) The Operating License (OL) authorizes operation of the development in accordance with environmental mitigation measures and operating requirements upon confirmation that the.

The mineral rent for the State is equal to the royalties plus taxes, plus earnings, per share of State investment (Campodónico 2008). As it was demonstrated in Chapter three, the strategy of the Colombian State has been to increasingly reduce the taxes and the royalties in order to stimulate the FDI, having as a result a reduction on the mineral rent. The taxes in the total production have gone from 13 percent in 2004 to 8 percent in 2009. A similar downward trend has had the weight of the royalties in the total mining production fell by the same period from 6 percent to 4.6 percent (González Posso 2011: 21). Law 863 of 2003 was enacted to reduce the proportion of royalties and taxes for the State in order to stimulate the FDI as a temporal prerogative, but then with Law 1370 of 2009 the temporal exceptions became permanent.

The principal reform is to revert this tendency. The Colombian government may sustain the tax exemptions for the companies that are entering the Colombian market to avoid any international infringement, but the exemptions must be reduced in time and not increased. These rules, as well as the proportions of reduction of exceptions, must be set clear to the mining companies. The exemptions are made in order to enable the companies to do the initial capital investment and make the country more competitive at the international level. However, the prolonged extension and increase of the exceptions are undermining the financial balance of the activity. The proportion of royalties received by the Colombian government should increase and reduce the percentage of exceptions gradually. This reform may create distributional balance between the extractive industries and the host State, reducing the level of public disapproval of the activity in the country. These reforms must be done in a short period of time taking into account the stability of the mining market and increasing profits of the companies in the industry.

Additionally, as established in Chapter One, the formula to calculate the royalties must be modified due to the increasing value of commodities in the international market. In a comparative view, it is important to analyze the option of a "wind tax" that, for example, has been proposed by the Peruvian government (Revenew Watch Institute 2011). This formula may be more risky but it can generate better revenues for the host country. Such a modification must be carried out by a widespread and public process of renegotiation of host-contracts with the mining industry, in order to avoid international responsibility in the future. The mining companies must understand that the well-being of the country make their investment more secure (Vale Columbia Center 2010).

Finally, the last reform is the idea defended by Carol Rose of property as recognition (Rose 2005-2006), extrapolated to the mining industry in Colombia. Even more complex forms of property must be explored in extractive industry in Colombia, a straightforward priority at this point is the idea of property as recognition. The idea behind this proposal is that the public institutions have confused traditional mining, or small-scale miners in rural areas of the country, with mining activities carry out by illegal groups. As it was mentioned, half of the mining activity in the country is illegal (ElEspectador.com 2011), but it is not that the kind of illegality that is behind those activities is different. On one side, there is a legitimate activity without the legal permits, and on the other, there is an activity carried out by illegal groups. Today, most of the small-scale mining done by rural miners without connection to illegal groups is illegal due to the absence of mining titles or even property rights over the territories that they are exploiting. It is clear that this phenomenon is different to the mining activity

carried out by illegal groups to finance illegal activities. This proposal does not address the mining activity performed by illegal groups but by small-scale miners.

The initiative is to introduce into legality the activities carried out by small-scale miners in order to reduce the margin of illegality in which this industry has played in for decades. The State must map the mining activity in the country and legalize or formalize the mining activity in the rural areas performed by small-scale miners as a subsistence way of life. In the rural areas there are vast territories without clear allocation of property rights that must be given to local inhabitants to complete their mining activities without allowing the overlapping with other property rights. The basic idea of property as recognition is that "*recognition measures are those that provide the administrative means to regularize private property ownership, particularly by formalizing ownership rights in persons who previously enjoyed only informal claims*" (Rose 2005-2006). Formalizing some lagging forms of small-scale activities may have three advantages. First, this formalization puts people within the State control radar. From this perspective, employment laws, environmental laws, zoning laws should be introduced into their activity. Introducing people into the formal market enables them to participate in it. Second, the formalization creates forms of identity that dignify their work and their life choice. Finally, it strengths a clear and less conflicted allocation of property rights that enables rural people to own their territories and break the inequitable tradition of ownership in Colombia. This can be the first step to collective forms of property that can be integrated with high-skill forms of extraction that could be less costly in environmental terms.

These six reforms try to tackle the most negative and notorious consequences of the mining industry in Colombia. The reforms can create a clearer horizon in order to reduce the negative effects of the mining industry and try to take advantage of its potential. The mining industry in Colombia is growing at a scale, which is why it is critical to modify the legal structure. The current rules are too small for such a voracious and expanding industry.

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