VIRTUAL ROUND TABLE
MINING 2016
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Simon has been recognized as a leading Canadian lawyer in global mining. He practices in the bank debt space, and has extensive experience structuring and negotiating syndicated facilities, LC bilaterals and project financings. In particular, he has developed expertise in acquisition financings, and has authored a leading Canadian text on the subject. Simon’s clients include numerous foreign financial institutions, private equity funds, corporations and law firms that retain him to assist with the Canadian aspects of multi-jurisdictional mine financings.

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Darrell Podowski is a partner with Cassels Brock & Blackwell LLP in the Vancouver, Canada office. Darrell practices business, mergers and acquisitions, mining and securities law, advising resource and industrial clients on going public transactions, corporate finance, merger and acquisition transactions and general corporate commercial matters in Canada and internationally. Prior to his law career, Darrell was an exploration geophysicist with Amoco Canada Petroleum Company and also in-house Corporate Counsel to Teck Resources Limited, and therefore Darrell possesses a particularly strong understanding of the commercial needs of his clients. In addition, he has a great deal of experience with Latin America transactions, and offshore experience as a result of his time working with a large Bermuda law firm.

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Adriano Drummond C. Trindade is a consultant with PinheiroNeto Advogados in Brasilia who has been nominated as a leading natural resources lawyer in Brazil by Chambers & Partners, Who’s Who Legal and Best Lawyers.

In 1998, He graduated with distinction from the University of Brasilia, studying Law and Politics of Natural Resources. He then graduated as a Master of Law from the University of Dundee in 2003.

He is also a member of the mining committee for BritCham – the British Chamber of Commerce and Industry in Brazil, while he also serves as a member of the legal committee of the Brazilian Mining Institute.
Andrés Ycaza Palacios graduated as a lawyer at the Pontifical Catholic University of Ecuador in 2007, and later studied in customs and foreign trade. He earned his Master's degree in Administrative Law at the Universidad San Francisco de Quito in 2016, after defending a thesis related to the legal analysis of the characteristics of the mining title in legislation. He has devoted his professional work primarily in two areas, customs and mining.

Previously, Andrés was lawyer of the branch in Ecuador of a major multinational company, based in Switzerland, attending the legal administration and management of the contract that the company had with the Ecuadorian customs authority for the provision of services capacity and pre-shipment inspection of goods.

He has conducted his business sponsoring administrative claims determinations, refunds of taxes, penalties, uprisings abandonment and other customs task to many industry players, such as couriers, shipping companies and importers, as well as being a consultant for the “Facilitating Trade” project of USAID in 2011.

On the issue of mining, his exercise has focused on the regulatory side. He has worked in obtaining permits and other authorizations preliminaries of the Ecuadorian State. He has served as in-house counsel for a Canadian company that maintains a major gold project in Ecuador, and currently remains its chief legal advisor in the country.

Carlos Vilhena has been a partner of Pinheiro Neto Advogados since 2001. His main specialism is in mining, though he also possesses expertise in institutional and government relations.

In 1992, he became a law and natural resources graduate of the University of Brasilia. Two years later, he also graduated as a master of laws from the University of Dundee Centre for Energy, Petroleum and Mineral Law and Policy.

Carlos acts in several roles for the International Bar Association, including his position as Vice President of the Mining Committee of the Energy Law Section, Environment, Natural Resources and Infrastructure. He is also the curator of the Rocky Mountain Mineral Law Foundation and is also the Legal Coordinator of International Areas for the Brazilian Mining Institute.

Ignacio Santamaria has been a Partner at Lloreda Camacho & Co. since 1996. He heads the Mining & Natural Resources, Administrative, and International Trade practice groups.

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Mining 2016

Mining Roundtable 2016 features the views and opinions of seven experts from around the world. We discover the recent regulatory changes across each of the five featured jurisdictions. Other highlighted topics include: a summary of the tax regime for mining projects, the impact weak commodity prices has had on mining strategies, and an analysis of which countries are currently ripe for investment. Featured countries are: Canada, Ecuador, Chile, Colombia and Brazil.

1. Have there been any recent regulatory changes or interesting developments?

Finch: On 2 December 2015, Ontario introduced legislation to amend the Mining Act (Ontario). If adopted, the changes will result in the implementation of an online registration system for mining claims as well as a new electronic mining lands administration system in Ontario.

The proposed new electronic claim registration system would replace the current ground staking and paper map staking system and the proposed mining claims registry would function as an electronic public record of mining claims that would include abstracts of pertinent entries for each claim, maps showing the location of all claims, any documents relating to the claim that are in electronic form, and information about each claim holder.

If the Bill is adopted, the amendments are expected to be implemented by the summer of 2017.

Palacios: Yes, last year was very active for amendments to Ecuadorian legislation which can be summarised through the three main acts:

Mining Act amendments to: i) recover VAT from costs since 2018; and, ii) artisanal mining commerce through Ecuador’s Central Bank.

Mining Rules of application amendment to: i) deduct the costs of processing, refining and transport for payment of patents; ii) simplify the procedure of total and partial resignation of mining concessions; iii) simplify the procedure of transfer of mining concessions; and, iv) make the procedure to delivery in warranty mining concessions easier.

New rules for the delivery of mining rights: i) a public bidding procedure to issue of new concessions; and, ii) prospection rules to aspire to new mining concessions.

Grez: A new tax regimen has been enacted in Chile, which will be fully applicable as of January 2017. According to the same, foreign companies will be able to choose, under certain circumstances, one of the following tax regimes:

**Partially Integrated System:** Payment of a First Category Income Tax (25% for year 2017, 27% for year 2018) and if profits are withdrawn from Chile by non-domiciled or non-resident shareholders or equity owners, an Additional Withholding Income Tax of 35%. In this case, 65% of the paid First Category Income Tax is used as a tax credit against the Additional Withholding Income Tax, generating a total tax payment of 44.5%. However, countries which have an existing and applicable double taxation treaty with Chile will be allowed to use as a credit the total amount paid as First Category Income Tax against the Additional Withholding Income Tax, generating a total tax payment of 35%.

**Attributed Income System:** Payment of the First Category Income Tax (25%) jointly with the Additional Withholding Income Tax (35%) once the income is attributed. This regime allows all tax payers to use the total paid First Category Income Tax as a credit against the Additional Withholding Income Tax, generating a total tax payment of 35%.

It is important to bear in mind that this legislation will be fully implemented in Chile as of January 2017 and consequently, its specific regulation is yet to be determined.

Additionally, there is a new labour bill under on-going discussion, which intends to grant more power to unions and to strengthen the role of collective agreements on labour relations. The indicated project is expected to become law during this year.

Podowski: In June 2015, the Federal Government of Canada implemented the Extractive Sector Transparency Measures Act (the “Act”). The Act requires entities in the extractive sectors to disclose payments made to government entities through a number of new reporting requirements.

Canadian businesses captured under the Act are required to annually report monetary or in-kind payments made to any domestic or foreign government in relation to the commercial development of oil, gas or minerals in any country under certain circumstances, in excess of CAD$100,000.
The Act requires companies to issue reports for each financial year beginning after 1 June 2015. On 1 March 2016, the government finalized a guidance supplement to the Act and implemented additional reporting procedures.

On 9 May 2016, new securities regulations governing hostile take-over bids (the “TOB Rules”) are expected to be implemented in Canada. The new TOB Rules extend, in general, the period that a take-over bid must remain open, from 35 days to 105 days. This change will alter the M&A landscape in Canada making it more difficult for buyers to complete such take-overs.

**Santamaria:** The National Development Plan (Law 175 of 2015), issued on 9 June 2015, modified and regulated several subjects regarding mining issues. A brief summary of the main changes introduced by Law 175 of 2015, is as follows:

**Financial Capacity:** In order to: (i) Grant mining concession contracts; (ii) assign mining titles; and, (iii) assign areas, the applicants and the assignees respectively are required to demonstrate their financial capacity for the exploration, exploitation, execution and development of the project.

**Extension of the Mining Concession Contract:** The extension of the mining concession contract must be requested at least 2 years prior to the end of the exploitation period. The National Development Plan determined that the Mining Authority may establish new conditions as a requisite to grant a time extension to the mining concession contract and to agree on different compensations other than royalties. Likewise, the titleholder must explain the financial reasons that support the extension of the exploration stage.

**Fee Payment:** Article 27 of the National Development Plan modified article 230 of the Mining Code and establishes that the calculation of the fee payment shall be made taking into account the number of hectares and the year of the exploration stage in which the concession agreement is when the payment is made. The amount to be paid is calculated in legal daily minimum wages per hectare. The fee payment for construction stage will be the equivalent to the fee paid for the last year of the exploration stage.

**Integration of areas:** The National Development Plan sets forth the possibility to integrate areas of mining titles from different classes that have been granted under any legal regime, even if they are not adjacent, provided that they belong to the same deposit.

**PINE:** The National Development Plan also determined the conditions that a project must comply with, to be a Project of National and Strategic Interest (“PINE” as per its acronym in Spanish), belonging to the private or public sector or both. Projects are selected as PINE by the Colombian government based upon their high impact in Colombia’s social and economic growth.

The National Development Plan established that the competent authority to evaluate and grant Environmental Licenses for a PINE was the National Authority of Environmental Licenses (“ANLA” as per its acronym in Spanish) removing the competence from the regional autonomous corporations (“CAR” as per its acronym in Spanish).

Furthermore, as per judgment C-035 of 8 February 2016, the Colombian Constitutional Court considered that the aforementioned rule was against the Colombian Constitution, due to the fact that the measure trespasses the autonomy of the CAR hence, it was declared non-constitutional.

Nevertheless, the bill was not well received by industry and civil society in general, as it departed from the existing framework and provided for much discretion of the State. It also failed to address certain key issues such as land access, rights and obligations, a transition regime, inter alia. So an alternate bill was prepared by a rapporteur in the House of Representatives last year, which is yet to be reviewed.

Once the bill (or the alternate bill) is reviewed and approved by the House of Representatives, it will be sent to the Senate for further review and voting.
If it is approved without any amendments, it will be sent to the President of the Republic for sanctioning. Should there be any amendments at the Senate, the bill is returned to the House of Representatives so that the amendments may be voted on.

**Vilhena:** The proposal for a new mining code is still under debate in Congress. The Government’s original proposal has been changed significantly. The current proposal being contemplated is much more market friendly. In view of the accident with Samarco’s tailing dam in November, a number of proposals have been submitted in Congress in respect to environmental matters, such as the creation of a financial guarantee for mine closure. These proposals are still under discussion in Congress, but changes in this area can be expected.

2. **Can you talk us through the current mining landscape in your jurisdiction?**

**Palacios:** The Mining Act was introduced in Ecuador in 2009 and has since seen three significant amendments. In general terms, natural resources (including mining) are exclusive property of the State, which also has the right to operate by itself (State Company). State can delegate mining activities to privates via bidding procedure. A mining right gives the concession holder an exclusive right to perform any mining phase as exploration (preliminary, advanced and faceability), exploitation (open pit, underground and alluvial), processing and benefit, and commerce of the minerals.

Mining title has a lifetime of 25 years, which are subject of renewal for a similar period of time. To conduct any mining activity, companies need three main permits: i) environmental license corresponding to mining phase performed, ii) from national water secretary, about the use and consumption of water; and, iii) an affidavit duly issued before a Notary that mining project won’t affect public buildings, highways, military bases, airports, ports and others. In every change of phase/period concession holder has to must achieve such permits. Mining rights are subject of transfer via approval of Mining Ministry (about 3-4-weeks) and, mining rights extinguish via caducity (per causes established in Mining Law as non-payment of economic obligations, violation of human rights, illegal mining, non-honouring of exploration activities or budgets).

**Grez:** In my opinion, the current mining landscape in Chile is marked by the search of efficiency and spending reduction in order to confront the slow economy and low commodity prices. Mining companies seem to be very concerned with their production costs and are looking for ways to maximize their assets’ value. Some of the strategies to achieve such purpose include the attempt to internalize and/or reduce power and energy costs, as well as combining operations with other companies to achieve successful developments.

**Podowski:** Recent developments in aboriginal law have had a formative impact on the Canadian mining landscape. In certain circumstances, companies are legally obligated to consult and, if appropriate, accommodate aboriginal peoples when a proposed mineral project could adversely impact aboriginal rights or title claims.

The threat of litigation over a breach of the duty to consult can inject uncertainty into the process of developing a mineral project in Canada, as it is difficult for companies to predict exactly what lengths they will be required to go to in order to satisfy their legal obligations to aboriginal peoples. Additionally, in 2014 the Supreme Court of Canada issued a landmark decision and declared for the first time the existence of aboriginal title in certain defined areas in the province of British Columbia. The impact of this decision on all areas of Canada remains to be seen, as courts have not yet declared the existence of aboriginal title elsewhere. Companies should be aware of this recognition of aboriginal title which, combined with the ongoing duty to consult, has had an impact on the current mining landscape. However, companies that engage in timely, thorough and culturally sensitive consultation with aboriginal peoples can minimize the risk of any conflict with affected aboriginal groups and can avoid costly litigation that may delay or cancel a project.

**Santamaria:** Currently there is optimism around the Mining Industry, due to the fact that two gold mines obtained their environmental license to carry out construction and exploitation activities.

But, on the other hand, different factors have affected mining activity in Colombia: (i) the illegal extraction of minerals shows an erroneous image of what mining activities really are and obstruct the development of technical and responsible mining; (ii) the regulation by jurisprudence of the rights of the Indigenous and Afro Colombian commu-
nities as traditional owners of the land, that forces the titleholder to carry out previous consultation processes with the communities in order to undertake any exploration activity, and now there is a theory that would force previous consultation processes even to enter into the concession agreements; (iii) the lack of clear regulations about the Indigenous and Afro Colombian communities preference right to obtain a mining concession contract within the area determined as an indigenous or Afro Colombian community zone; (iv) the environmental policies of the Colombian government regarding the environmental licenses, the delimitation of moorlands and the forest reserve extraction process; (v) the intervention of the local authorities to grant mining concession contracts; and, (vi) the low commodity prices that prevent more investments.

Trindade: Although low commodity prices had an impact in industry in general – and particularly in marginal projects/operations – mining companies that export their product and have its main operational costs based in Brazil managed to benefit from the devaluation of the Brazilian currency.

On the other hand, the market is currentlyExpecting a series of significant disposals to be made by major mining companies, which may diversify the current mining landscape.

The accident involving Samarco’s tailings dam may also have an impact in terms of more strict environmental licensing procedures and regulations.

Vilhena: The industry is suffering like in most other jurisdictions. There have been very little junior activities. The availability of funds for junior exploration is extremely scarce. Majors are reviewing expansions projects, some have put operations in care and maintenance and indicated that they may divest from non-core assets.

3. What impact has weak commodity prices had on mining strategies?

Finch: As prices for copper, nickel, iron ore and other raw materials have fallen, cost control has become imperative. Companies such as Teck Resources Ltd. and Anglo American, have withdrawn from or suspended work on projects and are lowering operating costs by laying off employees. While reduced production can help to stabilize commodity prices, many individual companies are wary of taking the lead on this. Some companies have continued to produce to generate the cash flow they need to pay down their debt. However, as financing becomes harder to obtain, some mining companies are being driven out of the industry.

Palacios: Ecuador has been stuck in a mining crisis for several years; not only because of weak commodity prices (specially copper and gold), but also for its aggressive regulations and high tax pressure. Those elements, in addition to the commodities crisis, caused the Ecuadorian mining industry to fall into a long sleep. Ecuador’s market is fully occupied by junior companies, which suffered heavily from the local and foreign crisis, resulting in no exploration over the last 4-6 years. So you can easily conclude that the crisis has hurt Ecuador hard, but that Ecuador is not only hurting due to the weak commodity prices.

Grez: The current weak commodity prices have provided mining companies with the opportunity to review and update their mining strategies in order to become more efficient and maximize their assets’ value.

In this scenario, the possibility of developing combined projects on areas that were originally developed separately has become appealing. Such an integrated approach allows the participating companies to consolidate infrastructure, to reduce costs and environmental footprint, to enrich the relationships with the community and to maximize the assets’ value, improving their development options and social licensing, decreasing initial capital demands and increasing financial returns.

An example of this type of transactions is the joint venture agreement reached by Goldcorp and Teck during Q3-2015, by which separate projects named “El Morro” and “Relincho” merged into a single mining project named “Project Corridor”. Project Corridor is currently one of the largest undeveloped copper, gold and molybdenum mines in the Americas and constituted a milestone in the Chilean mining industry that could definitely set a precedent for combining mining operations in our country.

Podowski: With the decline in commodity prices over the past 5 years, mineral exploration and mining companies have drastically altered their strategies to cope with the weak capital markets and reduced revenues. Companies, both big and small, have slashed or eliminated exploration programs, significantly cut work forces and have trimmed operating costs as much as possible. Five years ago, companies
were paying top dollar for assets, and now there is an M&A malaise as there is a perception that it is value-destructive. As a result, mining strategies have shifted from past practices toward portfolio optimization, concentrating on core assets and commodities, and seeking selective acquisitions, with little effort being put into green field exploration. In addition, companies are exploring other ways to develop their projects by seeking joint venture partners either to develop one project, or by entering into joint ventures with neighbouring projects to take advantage of synergies to save costs. They are also putting together alternative financing packages on their projects, such as royalty and metal streaming packages, to source revenue and optimize value from their current land holdings.

Santamaria: Weak commodity prices have had a real negative impact on the economic growth and Colombia’s financial resources, which undermine real export growth and fixed investment.

The Colombian government must assess this situation very seriously and create more incentives to attract foreign investment in this area of the economy as it is one of the main contributors of taxes and royalties in Colombia.

Trindade: Not only are mining companies cutting costs, they are also seeking alternative finance methods. Streaming deals have been increasingly popular. Some companies are reorganizing their assets and focusing on specific commodity groups. Major mining companies are also considering the disposal of core assets, which may represent an opportunity for a more diversified mining sector in Brazil.

Vilhena: Weak commodities have had a significant impact on the industry. The immediate impact has been for companies to aggressively cut costs. It has also led to a number of companies announcing that they will focus on core commodities and divest from others. For instance, Vale announced it will divest from fertilizers and probably from nickel and copper. Anglo American has also started a process of selling their niobium and phosphate assets. Others may follow.

4. How can the mining industry attract capital given the current stressed financial climate?

Finch: Facing a lack of sources of funding, mining companies must consider alternative financings, such as metals streaming arrangements that would see mining companies sell their production forward at a reduced price. While this has the downside of committing the mining company to production for however long it may take to meet the agreed production targets, current conditions dictate that mining companies may not have much choice but to accept this. On the other hand, streaming offers the advantage of avoiding the obligation to issue dividends and keeps debt off companies’ balance sheets.

The ability to produce certain commodities may help mining companies attract capital. It is expected that any capital that returns to the mining sector will favour copper, zinc, potash, gold and uranium.

Palacios: Ecuador is making great strides to solidify itself as a new mining destination in LatAm. Last year, Ecuador created a specialized Mining Ministry for the first time. It also softened its regulations and tax framework. Finally, in PDAC 2016, it announced the new mechanism of mining concessions. Despite the Governmental efforts in this scenario, the Colombian courts have a very different perspective which directly affects this necessary environment of legal certainty.

Therefore, the mining industry has to
develop an aggressive campaign to educate the courts in Colombia about the huge benefits of having a strong and modern mining industry in Colombia.

**Trindade:** Given the lack of availability of funds, companies have turned to alternative sources of funds. A number of streaming deals have been made in relation to Brazilian pre-operating and operating properties. Standard debt transactions may also be a source for those companies that have a large portion of costs denominated in Brazilian currency, but revenue arising from exports, as the Brazilian currency devalued significantly over the past 12 months. In cases of advancement of funds as payment for future exports, Canadian corporations have obtained favourable tax treatment on interest that are deductible at rate of up to 30% per year on a declining balance basis.

In computing income, operating revenue and expenses, including royalties, are taken into account. Depreciation of plant and equipment is allowed on a declining balance basis at various rates depending on the nature of the property. Interest expense is permitted as a deduction with deductibility of interest paid to shareholders owning 25% or more of the corporation being denied if the debt to equity ratio of their investment exceeds 1.5 to 1.

Expenses incurred in Canada to explore for and develop mineral resources are given special treatment. 100% of ‘Canadian exploration expenses’ (‘CEE’), incurred in a year may be deducted against income in the year or a subsequent year. Generally, CEE includes any expense incurred to determine the existence, location, extent, or quality of a mineral resource in Canada. Certain other expenses related to bringing a mine into production and the cost of a mineral property are considered ‘Canadian development expense’ (‘CDE’), and are deductible at rate of up to 30%.

Canada imposes a withholding tax of 25% on certain payments to non-residents, including on dividends, certain types of interest, and royalties. The rate of withholding tax may be reduced by a bilateral tax treaty between Canada and the recipient’s jurisdiction of residence.

In certain circumstances, shares of a Canadian mining company may be “taxable Canadian property” to a non-resident holder. In such cases, the non-resident will be subject to tax in Canada on any gain on the shares (unless exempted by a tax treaty) and certain notification and withholding requirements may apply.

Most provinces in Canada impose “income-based” taxes on producers of minerals at rates from 10-20%. The tax base is different from the income tax base. For example, interest expense, royalties and the cost of mineral properties are usually not deductible. Such provincial taxes are generally deductible against a corporation’s income when computing income tax.

Canada and some of its provinces levy broad based goods and services taxes and some provinces that do not levy a goods and service tax levy sales taxes on the purchase of tangible personal property. The combined rate of these taxes is in the 5-15% range. Such taxes apply to goods and services used in a mining project although goods and services tax will generally be refundable and exemptions from sales tax are available for certain properties.

**Palacios:** VAT: 12% of all purchases and costs of production. Also, exports of minerals have 0% VAT and you’ll be able to recover your paid VAT since 1 January 2018. Local sales of minerals get 12% VAT, and you can cross with your purchases. VAT is paid monthly.

**Income Tax:** 22% of the profits generated after deduction of all costs, over the calendar year (1 January to 31 December). Income Tax could rise up to 25% if the company is domiciled in a tax haven, or is controlled by a company domiciled in tax haven. Also, as a part of Income Tax, companies might have a legal obligation to anticipate quotas of projected income tax in the months of July and September.

**Royalties:** Ecuador participates in mining income via royalties. Royalties are calculated according to the type of exploitation, according to:
The income tax for equality (CREE) is an additional and individual tax on national companies’ income, levied at 9% of the taxable basis.

For CREE purposes, the calculation of the taxable basis is similar (but not identical) to ordinary corporate income tax, including deductible costs and expenses.

There is also a CREE surtax of an additional 6% rate (2016), for taxpayers with a taxable base higher than COP $800 million (approx. US$341,000).

An important issue to mention is the transfer pricing rulings, which are applicable to transactions carried out with foreign related parties or located in free trade zones or with any party located in a tax haven country.

All of the above, in addition to the royalties to be paid to the local and national government, as per the mining concession agreement.

Trindade: There is no specific tax regime for mining projects in Brazil. Mining companies are taxed in the same way as other industries in general. Depreciation and losses carry forward mechanisms are available just as in other industries, but legislation could be amended so as to consider the specifics of the mining industry. The oil and gas sector is a good example where there is a specific tax regime for the import of equipment that is used for operations.

On the other hand, given the policy of the Government to foster exports in general, transactions involving the advancement of payment for products to be exported may benefit from a more favourable tax treatment regarding interest to be paid on these transactions.

6. The challenging economic climate in the mining industry is causing many companies to either wind back or abandon projects. What termination risks need to be considered before suspending or terminating any projects?

Palacios: In Ecuador, it must be a financial decision based on taxes and regulation. First of all you need to check if you have all permits to perform mining activities, and consider how much Ecuador’s tax pressure may affect it, then if you can cope with it, you can go forward, if not, Ecuador’s mining act allows you to suspend activities, or to deliver back the concessions to State.

Grez: In Chile, several risks need to be considered.
assessed and dealt with before reaching a decision regarding the termination or suspension of a mining project. Most of these risks consist in assuring the compliance of environmental or social responsibilities of a project before its termination.

In this regard, the abandonment of a project in Chile in breach of its environmental and social responsibilities may lead to several legal consequences, especially when environmental or social damages arise from such breach. More so, the responsibility for damages originated from a project may be directly enforced to the projects’ owners and usually consists in the payment of large amounts of money as fines or for compensation purposes. Additionally, a suspended project may be definitely terminated and deprived of its original authorizations to perform activities if during its suspension any of the indicated responsibilities are not complied with.

In this regard, Law 20.551 on Closure of Mining Sites and Facilities provisions a procedure in which its main purpose lies in achieving the integration and execution of a set of measures destined to mitigate the adverse effects deriving from the development of mining activities.

Podowski: In suspending/terminating a mining project the objective is to minimize expenditures and/or cut operating losses, whether an exploration or operating project.

The following must be considered: loss of property or contractual title rights for failure to perform work/make expenditures; one time/ongoing environmental/rehabilitation obligations (care and maintenance/monitoring obligations); contractual obligations (option/joint venture, financing covenants (flow through share covenants, debt covenants), metal sales or off take commitments, supplier contracts); common law/statutory/contractual costs of employee termination/relocation, loss of quality employees, and costs of compliance with applicable collective agreements.

Consideration must also be given to stakeholder relationships: employees/unions, shareholders, suppliers, local governments/community/indigenous communities.

Santamaria: Mining projects generally involve not only obligations in connection with corporate, tax, and labour fields, but also social, mining and environmental liabilities.

Prior to suspending or terminating any project, concessionaires must bear in mind that all obligations acquired with the community where the mine is located, and the mining and environmental obligations acquired with the Colombian state, must be accomplished.

Just “leaving” the Country without fulfilling its obligations may lead to loss of the project in the near future and will make it almost impossible to return to it at a later date.

Trindade: Environmental remediation is a big concern, particularly when mining companies wind back or abandon projects due to financial distress. Public prosecutors tend to follow up the matter closely and, in some cases, may seek to disregard the corporate veil so as to reach shareholders in order to secure sound environmental measures to remedy the impact caused by the activity.

The layoff of a significant number of employees requires the involvement of unions, where negotiations usually take place to settle the conditions for termination of those employment contracts.

The impact of the termination of a mining project to local communities should also be considered.

Vilhena: Companies must obtain permission from the government to put operations in care and maintenance for more than 6 months in order to avoid fines and possible cancellation of mining rights. Explorations rights may be cancelled if properties are abandoned. Companies need to be very careful with respect of labour liabilities when suspending or terminating operations. Mine closure requirements should also be carefully assessed. Community and local government relations must be addressed, in view of loss of jobs, reduction of economic activity and fall of government revenue. These matters may jeopardize the ability of the company to restart operations and projects if the economic climate improves.

7. Can you discuss the current merger & acquisition landscape?

Finch: Large mining companies are shedding assets in order to clean up their balance sheets and investors’ expectations for short-term returns is pushing some companies to make divestments. However, this environment makes for an ideal time for acquisitions and mining companies with positive cash flow and healthy balance sheets are taking advantage of underpriced...
assets on the market. As exploration slows and companies’ existing assets earn low returns, companies may look to acquisitions as an alternative means to achieve growth.

One new development is the introduction of private equity sponsor as purchasers, rather than just the usual strategic suspects (for example, Magris Resources, X2, Waterton). As the major producers shed non-strategic assets to stabilize their balance sheets, a buying opportunity has presented itself for savvy players in the market. These private equity funds are typically led by former mining executives, and bring considerable experience and capital to the sale process.

Palacios: There are several elements to consider, as follows:

- Transfer of mining rights must have been approved by Mining Ministry, if this has not been achieved the transfer has no legal effect.
- Transfer of shares or equity rights on companies that are concession holders are not subject of approval from Mining authority, but it has to be notified and duly registered under Mining Regulation and Control Agency.
- If there is any chance of monopoly, or that the transfer may affect the market, it must be approved by Market Control Superintendence.
- Shareholders agreements must be approved by General Shareholders Assembly.
- Key issues for a due diligence practice in Ecuador for mining projects are: i) compliance of official obligations, as social security, taxes, reports to mining authorities; ii) environmental matters; iii) regulatory status of the concession; iv) good standing of the owners of the concession.

Grez: Nowadays, the merger & acquisition landscape is very active in the natural resources’ field and particularly in the mining sector. The general economic slowdown and low prices for commodities are triggering new opportunities for merger & acquisition transactions. We expect this will continue during the next years, especially in countries like Chile, which holds some of the most important worldwide copper deposits in the world.

Additionally, the combining of mining operations has become an appealing and effective figure that allows companies to maximize their assets’ value and become more efficient in the current landscape.

Podowski: The mining sector has experienced a decline in deal activity over the past five years. For the most part, M&A in 2016 will likely continue to follow the trends of 2015, and will likely be driven by divestitures. Emphasis will likely remain on trying to simplify portfolios by selling non-core (and sometimes core) assets, reducing capital expenditures and operating costs and seeking debt reduction. Shareholders are in large part driving this sales agenda. Expect to see increasing levels of non-cash consideration, deferred consideration and joint ventures so long as we remain in the present environment. However, a hesitancy still remains for companies with cash resources looking for assets, to buy. Ironically, given the state of commodity prices and the low valuations of miners, it is likely an ideal time for companies to be an acquirer. Companies prepared to buck the trend may reap long-term rewards.

Santamaria: Most of mining investment in Colombia comes from abroad. Therefore, mergers and acquisitions normally occur out of the country with side effects in Colombia.

What we have seen these days is the selling of projects from one company to another more than mergers and acquisitions processes as mining companies are relocating there investment efforts in different jurisdictions.

Trindade: As mentioned above, some major companies are considering the disposal of core assets. In addition, several mining companies are reorganizing its projects and operations and considering the admission of strategic partners. Given the devaluation of Brazilian currency, some assets may be offered at more competitive prices.

Vilhena: There are very few mergers & acquisitions in the sector at the moment. The expected divestment by majors of non-core assets may change this scenario in the near future.

8. Which countries are currently ripe for investment?

Finch: As the largest producer of zinc and potash and a major producer of gold, nickel, aluminium, uranium and lead, Canada is one of the most attractive countries for mining investment. And now, with the Canadian dollar trading well below its price in recent years, it is cheaper to invest here. Canada has topped Behre Dolbear’s ranking of countries for mining investment based on economic and political factors for the past two years in a row. According to a survey of mining and exploration companies conducted by
the Fraser Institute in 2015, five of the top-ten ranked sub-national jurisdictions for exploration investment are in Canada: they are Saskatchewan, Manitoba, Newfoundland and Labrador, Quebec and Yukon.

Conversely, the weak Canadian dollar makes it expensive for Canadian mining companies to invest elsewhere. However, Canadian companies have traditionally invested in Latin American countries and recent changes in Ecuadorian mining regulations make that country an especially attractive investment location right now. Since Kinross Gold Corp. abandoned its Ecuadorian project in 2013, taking a $720-million write down in the process, the government has reduced the formerly 70% windfall tax imposed on foreign mining projects (and hinted that the tax may be done away with altogether in the future) in an effort to attract foreign investment.

Podowski: Although the past decade has been difficult for investors looking into Argentina, the recent change of government presents a positive change and distinct potential for investment in Argentinean mining. Since December 2015, Argentina has taken a number of significant steps to revitalize its mining industry and provide investors with a certain level of confidence and comfort looking forward, including the lifting of currency controls, elimination of export taxes, lifting of certain import restrictions allowing for international sourcing of equipment, and restarting negotiations with holdout bondholders from Argentina’s 2001 default. The government has also lifted restrictions on repatriation of earnings and dividends. A devalued Argentinean Peso may also result in lower costs for project development.

Podowski: Yes, the main development in Ecuador is electricity, which will widen access to cheap energy, in comparison to the LatAm zone. Advances in mobility are important too, such as highway roads, ports and airports. On the horizon, a specialized port of copper is projected, hopefully by 2020.
10. In an ideal world what would you like to see implemented or changed?

Palacios: Ecuador’s main objective must be to reduce tax pressure, probably in that regard, a key objective should be to remove windfall tax, which is currently considered one of Ecuador’s least attractive aspects.

Santamaria: In an ideal world, I would like to see the implementation of a frontal and effective attack against the criminal extraction of minerals. This felony is called “illegal mining” which is a confusing term, relating to the real cause of contamination, environmental catastrophes, and the bad image of modern, technical and responsible mining.

Trindade: As a general note, a closer and more proactive dialogue between companies and Government in terms of requirements and commitments for mining, so as to build a more attractive environment for the sector and to enhance opportunities for economic and social development.