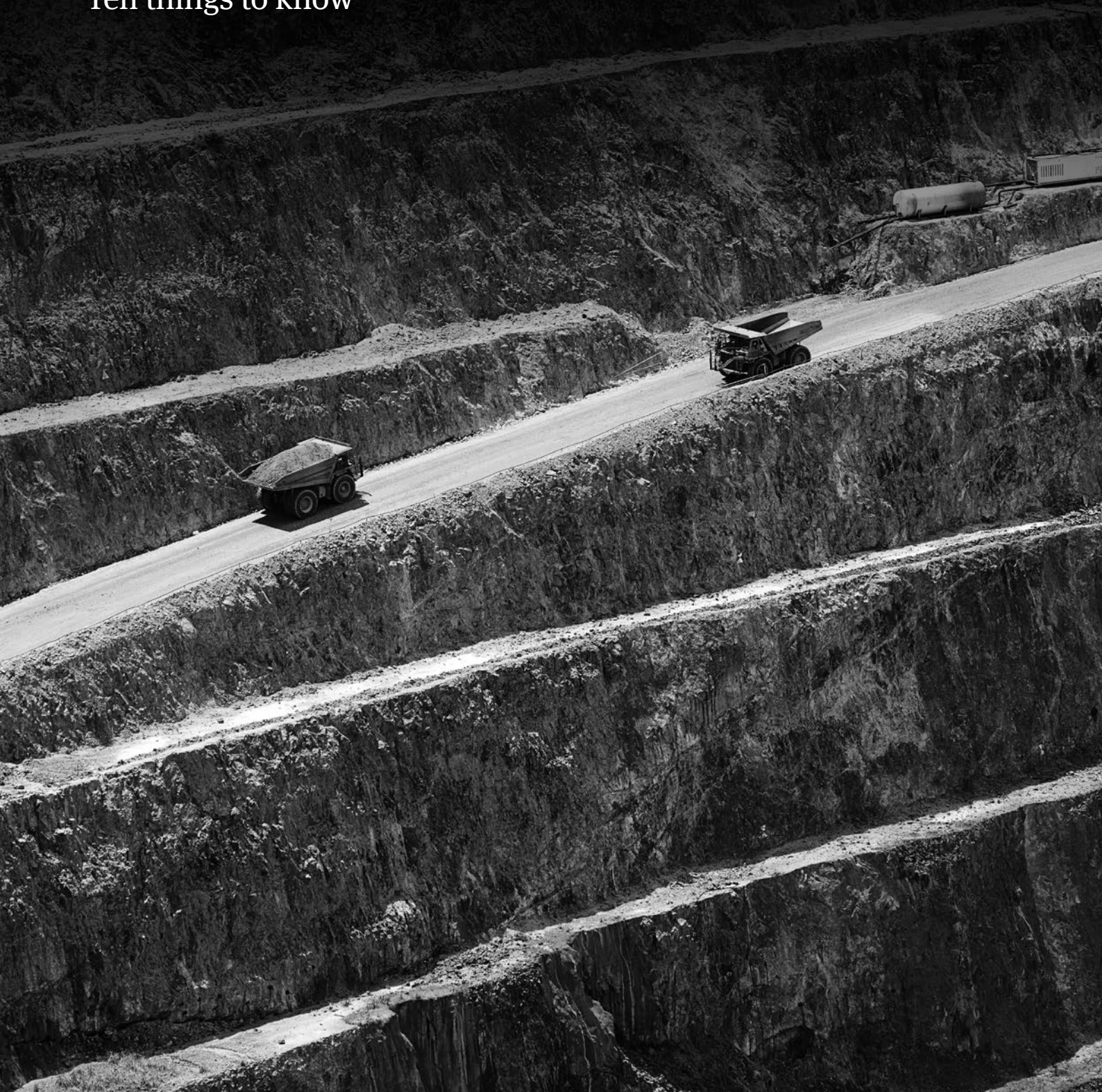


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 **NORTON ROSE FULBRIGHT**

Mining in Venezuela

Ten things to know



Mining in Venezuela

01 | State ownership of minerals

Mineral Deposits in Venezuela are owned by the State, which can develop them directly or through State-owned companies or joint venture companies with private entities. It can also award mining rights to private entities or individuals, through mining concessions and authorizations for small scale mining. Mining of iron ore is reserved to the State, and mining of gold and other “strategic minerals” is reserved to the State or to joint venture companies in which the State has a minimum equity participation of 55 per cent.

02 | Mining authorities

Most mineral exploration and mining activities are regulated and managed at national level. Non-metallic minerals are regulated and managed at state level. At national level, the mining authorities are the Ministry of the People’s Power for the Ecological Development of Mining (Ministry of Mining); the National Office of Mining Assessment and Inspection (Oficina Nacional de Fiscalización e Inspección Minera) – a support governmental agency of the Ministry of Mining in charge of monitoring and assessing compliance with the regulatory and mining title obligations of title holders; the National Mining Security Task Force (Resguardo Nacional Minero) – a police component of the armed forces in charge of inspection and control of mining activities; and the National Institute of Geology and Mining (Instituto Nacional de Geología y Minería) – the scientific and technical arm in mining matters and national information center in charge of maintaining an inventory of the minerals within the country. At state level, the mining authority is the relevant State Governor, who usually exercises such authority through a special secretariat or direction within the administrative structure of the state.

03 | Mining regulations

The key piece of legislation is the Mining Law of 1999, along with its corresponding administrative regulations. In the case of gold and other “strategic minerals”, they are governed by the Organic Law Reserving to the State the Exploration and Exploitation Activities of Gold and Other Strategic Minerals of 2015. The environmental regime and the permits for mineral projects are regulated by the Organic Law on the Environment of 2006, and by several technical and procedural decrees further regulating the provisions of the law, namely on zoning, permitting, environmental studies, technical specifications and related matters applicable to exploration and mining activities.

04 | Mining titles

The mining title (except for non-metallic minerals governed by state law, and for iron ore, gold and other “strategic minerals”) is in the form of an exploration and mining concession, which is issued by the Ministry of Mining. Such concessions include a maximum 3 + 1 year exploration term and a 20 year exploitation term, including up to seven years for mine development and construction. Extensions are possible for up to ten years each up to a maximum of 20 years, at the discretion of the Ministry of Mining. Concessions are issued at the discretion of the Ministry of Mining, usually, but not necessarily, on a first come, first served, basis. Applicants for concessions must evidence their technical and financial capabilities to the satisfaction of the Ministry of Mining. Concessions have a maximum area of 6,156 hectares (save for concessions or contracts issued under previous laws). Concessions are granted for specific minerals. If other recoverable minerals are identified, the concession holder has a preferential right to be awarded mining rights to such minerals.

In the case of iron ore, gold and other “strategic minerals”, mineral rights are typically issued to State-owned companies or joint venture companies in which the State has a majority equity participation, as the case may be. Such companies are bound, unless otherwise provided for in the Organic Law Reserving to the State the Exploration and Exploitation Activities of Gold and Other Strategic Minerals or in the respective creation, transfer or other decrees or acts, by the provisions of the Mining Law and its administrative regulations, as well as by all environmental and commercial regulations.

Mineral rights for non-metallic minerals governed by State laws are issued according to such laws, which provide for a number of different titles, such as mining contracts, concessions, contracts awarded by auction, mining permits, etc.

05 | Regulatory stages of mining projects

Exploration: during the exploration term (up to 3 + 1 years) title holders must present and implement an exploration plan; produce detailed maps of the concession area; identify the areas chosen for mining (which cannot exceed 50 per cent of the area of the original concession); and file a feasibility study and an environmental impact study for the intended project. The Ministry of Mining approves the feasibility study and issues an exploitation certificate, allowing the title holder to start development, construction and mining activities.

Exploitation: projects must be brought into production within the seven years of publication of the exploitation certificate. Exploitation includes the right to process, refine, transform, commercialize and export minerals, save for the case of gold and other “strategic minerals” where production must be sold to the Central Bank of Venezuela or to a third-party buyer authorized by the Central Bank of Venezuela. Once production starts, it cannot be stopped for more than a year save for force majeure causes agreed by the Ministry of Mining.

06 | Royalties and taxes

In addition to general taxes such as income and value added taxes, mining activities are subject to the following special taxation:

Surface tax: an annual and variable fee calculated from the date of issuance of the concession (not applicable to gold and other “strategic minerals”). It is due starting with the fourth year from publication of the mining title, for the duration of the concession. However, surface taxes are deductible from exploitation taxes/royalties, so after start of production the surface tax becomes sort of a minimum royalty. Surface taxes are paid quarterly in arrears and range from around US\$0.03 per hectare per year to around US\$0.06 per hectare, per year.

Exploitation tax: a monthly gross royalty on production (not applicable to gold and other “strategic minerals”). It is due within the first 15 days of every calendar month with production, whether or not the extracted mineral has been sold. It can be collected by the Treasury in cash or in kind. Calculation of taxes is dependent on the type of mineral.

Royalty: an additional charge equivalent to a gross royalty ranging from 3 per cent to 13 per cent on production of gold and other “strategic minerals”, payable in cash or in kind, at the discretion of the Ministry of Mining, and calculated on the value of the final product resulting from the mineral.

Special Advantages: Contractual or mining title commitments assumed by investors for the benefit of the Republic relating to investments or actions of a social, economic, technological, infrastructure or any other nature, typically proposed by the relevant investor and deemed acceptable and satisfactory by the Republic. These special advantages can include obligations to transfer technology, build infrastructure, make social responsibility investments, and train and educate on specialized geological and mining matters. In the case of gold and other “strategic minerals”, the Ministry of Mining has the right to impose additional payments on a percentage basis as part of such “special advantages”. The percentage of these additional payments

is defined at the time of transfer of the activities of exploration and production of mines of gold and/or other “strategic minerals” to the respective title holder.

07 | Land issues

Land property rights are separate and independent from mining rights. Holders of mining rights are not required to own the land where the minerals are located. However, the law allows the title holder to use the land required for exploration, mining and ancillary activities, even if privately owned by third parties. In principle, use of this land should be agreed between holders of mining rights and land owners/occupiers. If no agreement is reached, the holders of mining rights can judicially obtain authorizations for easements, temporary occupations, and expropriations of property in order to carry out mining activities. They also have the right to use the water of public domain in compliance with the environmental legislation.

08 | Rights of foreign investors and protection of investments

In general, foreign investors have the same rights as Venezuelan investors. However, foreign state owned or controlled entities require National Assembly authorization to hold, directly or indirectly, mineral rights in Venezuela. The Constitution and laws allow for expropriation of assets with fair and timely compensation. However, Venezuela has had a recent history of nationalizing certain resource sectors (such as the oil and gold mining sectors). This has resulted in legal actions taken and international investment arbitration filed by investors against Venezuela. Venezuela has lost in some of those international arbitration procedures and has been ordered through the arbitration award to pay an indemnification to the respective investors. As of mid-2016, Venezuela has never refused to voluntarily pay the indemnification. In fact, as of mid-2016, there is no case law on the enforcement of arbitration awards against Venezuela. In general, foreign investors structure their investments in Venezuela through countries, which are signatories of bilateral investment protection treaties (BIT) with Venezuela. Generally, a BIT guarantees investors proper and timely indemnification in the event of an expropriation and a fair review of the case by a neutral forum. Although Venezuela recently withdrew from ICSID, there should always be alternative forums for arbitration under the BITs.

Currently Venezuela has BITs with: Argentina, Barbados, Belarus, Belgium-Luxemburg Union, Brazil, Canada, Chile, Costa Rica, Cuba, Czech Republic, Denmark, Ecuador, France, Germany, Indonesia, Iran, Italy, Lithuania, Paraguay, Peru, Portugal, Russia, Spain, Sweden, Switzerland, United Kingdom-Northern Ireland, Uruguay and Vietnam.

09 | Environmental matters

Mining is subject to zoning restrictions and environmental permits. There are special areas, such as forestry reserves, subject to more stringent regulations, and other areas where mining activities are strictly forbidden, such as natural parks. Both, exploration and mining activities are subject to previous environmental authorizations from the relevant authorities. The first one is the Authorization for the Occupation of Territory (*autorización de ocupación del territorio* – AOT), which is basically a zoning permit acknowledging that mining activities can be conducted in the area covered by the mining title. The second permit is the Authorization to Affect Natural Resources (*autorización para afectación de recursos naturales*) (AARN), which is required for exploration activities and later for construction, development and mining activities.

AOTs require the filing of an environmental questionnaire in an official format, including a general description of the area and of intended activities. AARNs require, even for exploration activities, the filing and approval of an environmental impact study. AARNs include authorization for specific activities and reclamation plans. AARNs usually require the posting of performance bonds in order to guarantee the implementation of the approved reclamation plans. The title holder is required, prior to exploitation, to post a bond for environmental damages resulting from such exploration.

10 | Foreign exchange regime

Venezuela is subject to a currency exchange control regime, which essentially restricts the conversion of local currency (namely, Bolívars) into foreign currency. The currency exchange control regime, generally speaking, does not prohibit or restrict the entering into contracts denominated and payable in foreign currency, the invoicing in foreign currency and the payments made in foreign currency. Based on the foregoing and generally speaking: (a) if a company receives payments in foreign currency as a result of its business activities in Venezuela, and is not subject to or is exempted from the exceptional repatriation obligations under the exchange control rules, such company can keep those funds in foreign currency and use them for any legitimate business purpose, and (b) if a company receives payments in local currency (namely, Bolívars) as a result of its business activities in Venezuela, or receives them in foreign currency but is anyway subject to and is not exempted from the exceptional repatriation obligations under the exchange control rules, such legal entity may or may not be subject to statutory restrictions to convert such local currency into foreign currency and, therefore, to statutory restrictions to repatriate funds out of Venezuela.

In the case of gold and other “strategic minerals”, joint venture companies conducting mining activities are essentially: (a) obligated to sell all foreign currency they obtain for any reason (in exchange for local currency) to the Central Bank of Venezuela at the official exchange rate(s) fixed by the Central Bank of Venezuela and the Ministry of the People’s Power for Banking and Finance, and (b) only allowed to hold bank accounts and maintain deposits in foreign currency with the Central Bank of Venezuela or, if and to the extent so authorized by the Central Bank of Venezuela (whenever, in its sole judgment, the circumstances justify it), with banking institutions in or outside of Venezuela.

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