

Colombia: Legal Loopholes behind Illegal Gold Trade

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Bio

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Abstract

This paper details how the global gold mining boom touches ground in Colombia. Based on field research in different ASGM sites, it argues that the Colombian government, while targeting its regulatory reforms towards foreign direct investment in large-scale mining, has created more ambiguity around ASGM. At the same time it has created what we call legal loopholes, which allow different actors in the gold trading chain to benefit from vacuums or ambiguities within the law. In this process, international distributors, intermediaries and public servants benefit most as they manage to buy and sell large volumes of illegally mined gold, and legalize it.

Introduction

In the late 2000s, the world experienced a mining boom that had a major impact on countries with large gold reserves like Colombia. Around this time, Colombia occupied the 48th position as a gold producer in the world. By 2019 it became the 19th largest (WGC 2019). The global mining boom was driven by the spike in the international gold price, the rise of gold as an investment asset, and a generally investor-friendly regulatory environment. In Colombia, internal causes for the boom included economic decisions and changes in the national regulatory system. Different measures were taken during the governments of Álvaro Uribe (2002–2010) and Juan Manuel Santos (2010–2018). Economic decisions were reflected in a new mining code in Law 685 of 2001 – enacted during Uribe’s presidential term – and in the National Development Plan (NDP) where Santos termed mining the “locomotive of development.” Several measures were put in place that aimed at attracting new foreign direct investment and transforming Colombia’s extractive sector into one of the most important industries of Latin America (Sankey 2013). As will be explained below, however, the vast majority of gold mining operations have remained small-scale, with large-scale industrial operations taking up only 2%. Moreover, the overwhelming majority of small-scale operations are informal. This means that, by definition, they do not comply with the abovementioned regulations.

The global mining boom found fertile ground in Colombia to “touch ground”, as it is put in this volume. In this sense, apart from the regulatory changes, it is also important to highlight the country’s high rate of inequality and the limited availability of alternative livelihood options for the rural population. These pushed the migration of a poor rural population into gold-mining areas. Informal small-scale and artisanal gold mining became an attractive opportunity to make quick money, even for newcomers who did not have special skills or previous knowledge. ASGM has been practiced in different forms (underground and alluvial) in several regions in Colombia. As will be explained below, these types of mining have been called “traditional” or “subsistence” mining. More recently, thanks to the introduction of new technologies and equipment to mechanize extraction and processing, the scale of ASGM significantly increased. Thus, the combined factors of technological innovation and a presence of cheap, unskilled laborers, produced a fertile ground for ASGM to boom.

However, these realities on the ground have been largely neglected in the regulations the Colombian government has pushed through over the past two decades. Pressured to obtain a strong position in the global gold market, the Colombian government concentrated on facilitating the entrance of industrial gold mining in the country. However, it did not take into account the dynamics around gold mining and land ownership that were already present long before the mining boom. A lack of knowledge on cultural diversity, the use of the land by indigenous communities, and local socio-political dynamics resulted in contradictions between the law and local realities. With a stroke of the pen, most pre-existing ASGM-activities were rendered illegal. Pre-existing mining titles and land tenure arrangements needed to pass through a new, extensive bureaucratic process in order to be formalized. As this administrative process was too burdensome for many ASGM operators, their concessions were given to large-scale mining companies, creating an overlap between new and old mining titles. This resulted in numerous conflicts with local miners. To make this scenario even more complex, the mining boom also fostered the arrival of armed groups (FARC, paramilitaries, criminal bands) seeking to benefit from gold profits, invading and occupying local miners’ plots and in most, if not all cases, subjecting miners to forced labor under the threat of death. In this landscape, boundaries between what is formal/informal and legal/illegal mining become even more blurred.

In this paper, we will demonstrate that these contradictions in the governance of Colombian mineral resources have resulted in a series of legal loopholes that are now used as windows of opportunity for the illegal commercialization of gold by powerful intermediaries. We define legal loopholes as vacuums or ambiguities within the regulatory system that can be used to circumvent the law for a purpose. In the first section of the paper, we zoom in on the global and local factors that have contributed to the gold-mining boom in Colombia. In the second section, we look at the regulatory changes and their effects on gold commercialization, as they result in ambiguities and insecurities that facilitate illegal mining operations. Finally, we identify who benefits the most from the gold commercialization system and the legal loopholes created by the Colombian government. We conclude that at the top of this system we find intermediaries, International Distributors and public servants; at the middle local vendors, and at the bottom miners.

The article uses data from Colombian national statistical sources as well as qualitative data from field and ethnographic research done by Eugenia Robles during three months in the mining areas of 1) Union Panamericana, Condoto, Tado, in the region of Chocó, 2) Marmato, Department of

Caldas, 3) Remedios and Segovia, Department of Antioquia. During this time, 50 surveys were implemented in the region of Chocó. More than 40 semi-structured interviews were conducted in all the mentioned areas, with local actors such as mining leaders, gold shop owners, mineworkers, local authorities, and national authorities. Desk research included consultation of national statistics and the existing literature on gold mining in Colombia, annual reports from institutions working on the topic of mining, and legal documents.

Untangling the gold-mining boom

As mentioned above, poverty and a lack of economic alternatives provided a conducive environment for the mining boom to touch ground in Colombia. In the early 2000s, Colombia had a gini index of 56.0 (Mundial 2018) and was known as one of the most unequal countries in the region. The rate of unemployment reached 20% (CIA Factbook 2019), with a large part of the rural population subsisting on agriculture. In this landscape, gold mining appeared as an attractive economic alternative for farmers, many of whom migrated to mining areas in different regions of the country to start extracting gold. But they were not the only ones. During that period, different armed groups, who were previously managing coca farming, turned their interest to gold. Their arrival led to the disruption of the social fabric, bringing fear, chaos, and violence to mining areas. In the slipstream of these newcomers and armed groups, new technologies and financial capital also flew to the mines, creating possibilities to scale up production and generating more profits.

This can be illustrated with the case of Chocó, the afro-descendant region that is also known as the poorest region in Colombia. Here artisanal/traditional/subsistence gold mining was widespread long before the mining boom. Underground excavations in the form of timber tunnels – locally called *guaches* – were the preferred method of gold extraction. During a focus group with legal representatives from different mining communities in Chocó in 2018, miners remembered how the mining boom period brought chaos to the region. At the time, *guaches* were used by newcomers and armed groups as reference points to start performing mechanized excavation with retro excavators. The land in the region was usually family-owned, but the high demand for gold pushed families to negotiate with owners of retro excavators over access to their lands. In the case of armed groups, there was no negotiation. Families were forced to let the retro excavators onto their lands, work for the groups, and receive only a small percentage of the profits in return. One of the focus group participants summarized these changes as follows:

Before, your word was fundamental. You could trust people, but with the economic interests that appeared (after the mining boom), that word has become something secondary. Now what we have are guns, shouts, threats and even the disappearance of entire families (interview with legal representative, 2018).

As a consequence of all this, the previously unmechanized and low-tech, so-called artisanal/traditional/ subsistence gold mining, was also gradually replaced by mechanized small-scale operations – although the former type does continue to exist.

As mentioned, the mining code of 2001 recognizes both production modes (in addition to large and medium-scale). But in practices, very few of these operations comply with the legal requirements. Small-scale miners who decided to enter into this legalization process realized that

this was not only an expensive bureaucratic process but also a very long one. Many of them complained about the lack of support and information provided by the government. They were discouraged when they were notified that while the legalization was in process, they could not perform any extractive activity. This meant that they had no means to keep financing the costs of legalization, which in most cases led to its abandonment. As a result, most ASGM miners continued mining without a legalized mining title. The remoteness of mining areas and scarce presence of the state allowed for this situation to persist without control or penalties.

In parallel, industrial mining companies initiated the process of acquiring titles for large-scale mining. As requirements for legalization were similar to those for small-scale miners, companies did not find it very complicated to cope with the costs. Because of their financial , they were also given preferential treatment in order to reduce waiting time. The government's strong desire to attract new foreign direct investment facilitated the entrance of industrial companies into old and new mining areas. As we mentioned earlier, this was facilitated through changes in the regulatory system, which led to a number of institutional complexities that we will explain in the next section.

Institutional complexities in mineral tenure

In the desire to encourage foreign investment, the government decided to explore new mining areas by implementing geographic information systems such as a mining census and mining registry verification processes. These were part of the 2001 mining code. Later, in the same mining code and by Decree 1382 of 2010, mining reserve areas (abbreviated as ARE in Spanish) entered a re-demarcation process. This meant that more territory was freed up and offered to companies under concession contracts. As a result, over the past decade, the area covered by approved gold titles increased by over 700%: from 3,583 km² in 2001 to 29,361 km² in 2016.

These mining titles, however, have been granted on land covered by collective ethnic rights, national parks, and *paramo* (alpine ecosystem) areas. The overlapping of mining titles with these lands implied not only a violation of indigenous' and afro-descendant communities' rights, but also created legal ambiguities that have produced more conflicts. Vélez explains this legal ambiguity as the co-existence of two official "architectures" of rights: one supporting the private accumulation of capital through the foreign and capital-intensive exploitation of mining resources, and the other focused on securing land rights and access to natural resources for indigenous peoples. This situation has produced several violent disputes over access to land (Vélez, 2014: 49), as has been described in many other contexts in Africa (Fisher 2008; Benjamin 2008; Geenen 2015) and Asia (Verbrugge 2015).

In Colombia, one case of legal ambiguity occurs in the municipality of Marmato in the Department of Caldas. In this area gold has been mined since colonial times, about 500 years ago. The Marmato conflict started in 2007, when the Colombian state granted mining titles for mine pits that had been inactive for over a year¹ to the Canada-based multinational Gran Colombia

¹ According to the Mining Code of 2001, mines that remain inactive for more than a year have to be returned to the state.

Gold (GCG).² GCG subsequently aimed to acquire more titles, seeking to take possession of the entire El Burro mountain – the mountain where gold had been extracted for about 500 years. They turned to the small-scale miners, many of whom also had legal titles, to buy more. Of the 121 mining titles that belonged to small-scale miners in Marmato, 96 were bought by GCG. Those who sold their mining titles to the company claim that although these arrangements were consensual, selling prices were “ridiculously low” as at the time. Furthermore, they feared they would be fined or would have to enter a more complicated judicial process with the government if they did not comply with GCG. As the small-scale miners’ legal advisor said:

At that time, they came [GCG] and told us we were in violation of the law, and that if we wanted to avoid fines or a legal process, we would have to sell our mining titles to them. Many of our miners got scared and sold their mines for nothing! Later on we realized that it was actually the government that gave the rights to that company, and left nothing to us, and we have been here for 500 years! – Legal advisor, Marmato’s Mining Association.

Since 2007, miners in Marmato have organized ongoing, peaceful protests and have mobilized local leaders and authorities to negotiate with GCG and the government. They have networked and obtained support by consulting with different indigenous organizations as well as local mining leaders and professionals from the area in order to take on the GCG through Colombia’s constitutional court. After ten years of negotiations, in 2017 the constitutional court ruled in favor of the miners’ petition for a previous consultation (*consulta previa*) to be made on who can mine gold and how in the El Burro mountain. From the miners’ standpoint, this resolution was interpreted as a partial victory. Since then, GCG has returned 13 mining titles to local small-scale miners.

The case of Marmato is exemplary as it is the first case in Colombia where a conflict between ASGM miners and a company has turned out in favor of the former. It is also particular as Marmato is one of the few mining areas in the country where armed groups are not present. According to its inhabitants, Marmato has always been a pacific town. They avoided violence by isolating outsiders or possible paramilitaries without fighting back. If armed groups are present in a mining territory where a dispute between ASGM miners and a company is at stake, a layer of complexity is added and ASGM miners usually end up disadvantaged.

Legal loopholes in gold trade

Colombia’s gold trade is one of the most regulated in South America. However, the regulations focus on registering the volume of sales and do not reach up to the production level. The Unique Registry of Mineral Merchants (RUCOM in Spanish) is a registry system designed for ASGM miners who already have formal mining titles and/or are enrolled in the formalization process. It enables municipal authorities to determine the allowed sales volumes per month according to the amount of registrees. Local vendors must keep these records and report the seller’s data. This is the first level of the sales chain. It depends on the approval of municipal authorities, public officials who, in turn, gain significant electoral capital through the certifications they grant.

² The GCG is the result a merge between The Canadian mining company “Medoro Resources” and the Colombian company “Colombia GoldFields Ltda.”

It is difficult to identify who is responsible for controlling gold production, as opposed to gold sales. At the selling point, miners need to declare in which concession the gold had been mined. Yet miners who work without a mining title or in restricted areas commonly arrange to have a copy of a mining title and falsely report that they actually work in a legalized concession. In many cases, people who are not miners register themselves as miners and allow those who mine illegally to use their mining registry information.

Initial information from ongoing research by the author of this paper shows that the lack of control over production volumes in areas with mining titles is one of the legal loopholes that intermediaries and/or international distributors use to justify the buying or selling of gold. To understand this, it is important to discuss the actors in the chain. First, ASGM miners sell to local vendors. But as these ASGM miners are commonly not registered and/or they may have exceeded the amount of gold RUCOM allows them to sell, this gold needs to be justified. This is where intermediaries come in. Intermediaries buy the gold from local vendors. Intermediaries are not legally recognized, but perform a crucial role in the chain. They have a substantial network of local authorities and public servants who provide them with a list of mining titles that can be used to justify the volumes of gold produced. In some cases, these titles are owned by public servants; in others, public servants provide copies of mining titles to intermediaries. Often, these are titles of inactive mining areas. In many cases, owners of these lands are unaware that their mining titles are being used for this purpose. Intermediaries then take the gold to an international distributor or ID. An ID is a legal entity that purchases raw gold, smelts it and sells it to refining companies abroad or to jewelers within Colombia. For each sale an ID must submit a purchase and payment of royalties report to the National Mining Agency and a billing report to the National Directorate of Taxes and Customs. IDs not only work with intermediaries but also obtain registered gold from certified mining companies.

This system allows actors at all levels to take advantage of the loopholes left by the lack of traceability of gold production, which in turn allows for the legalization of what is technically illegal production. As we have seen before, this is the case for the majority of the gold produced in ASGM. ASGM operations increase production volumes. As they grow, selling locally becomes less relevant. Sales are therefore made through regional sales companies or directly to IDs, leading to the parallel strategy of incorporating technically illegal production in the formal marketplace.

producer uses invoices with fraudulent amounts to report an amount of gold that is lower than the one he is actually selling. All this is possible because of the state's failure to enforce its regulations, as its lack of capacity to oversee in-situ production.

Who benefits and who loses?

Actors benefiting the most from this trade chain are those who have powerful political connections, have legal documents, and negotiate with local vendors. Specifically, those are intermediaries, IDs, and public servants. IDs take the highest share, as they can work with multiple intermediaries and obtain the benefits without having to risk anything. They are also very well connected to public servants and in some cases armed groups, who provide protection in exchange for gold.

Intermediaries are key actors in this chain. They play a central role as they not only have connections with local vendors, whose trust they have gained, but also with IDs and public servants. They constantly risk being mugged or killed. However, they can also collect large amounts of gold and disappear with it. This has happened to many local vendors, who – even after having worked with and trusted the same intermediary for years –were deceived and never saw their money back.

Public servants are important, yet they are not always stable. Hence, negotiations with new authorities are important in every election. This political game is something that intermediaries and IDs have already identified and they are constantly creating new connections with future candidates.

Local vendors, on the other hand, depend on intermediaries. Without them, they cannot sell their gold. However, there are many intermediaries that need to gain local vendors' trust. Local vendors do not rely on only one intermediary but have at least two or three. When the gold price decreases, intermediaries play with transaction costs. This means that they will compete with other intermediaries offering a higher price to local vendors. When this happens, local vendors usually sell their gold to the highest bidder.

Miners are the last to benefit from this chain. Even if they extract the gold, they are subjected to the prices paid by local vendors, who in turn have negotiated a price with the intermediaries. This means that the selling price of gold for miners is reduced to an average of 30% of its actual value. Although miners are aware of this difference in their income, they have accepted it. It is a cost of opportunity that they are willing to take in order to continue working informally.

Conclusion

This chapter has presented some of the challenges Colombia faces in regard to gold production and trade. The analysis has focused on understanding how the global mining boom has touched ground in Colombia, and how it has changed the face of ASGM as well as industrial mining. The

IDs, which can sell 35 grams a month until the maximum is reached. What is sold is recorded together with the royalty payment (4% of the sale). To make the transaction appear transparent, the vendor applies a greater deduction (a decrease in the sale price according to a law or due to the purity of the ore sold) to justify the small DIAN payment for a quantity of ore that is worth much more (UMPE-UNAL, 2017: 12).

Colombian government, while targeting its regulatory reforms towards large-scale corporate investment, has created more ambiguity around ASGM. At the same time it has created what we have called legal loopholes, which allow different actors in the gold trading chain to benefit from vacuums or ambiguities within the law. In this process, international distributors, intermediaries and public servants benefit most as they manage to buy and sell large volumes of illegally mined gold, and legalize this.

The solution to this problem is not to implement more vigorous control and monitoring over the production and trade of gold but to restructure a regulatory framework that is more flexible and that can adjust to each local context. The restructuring of this regulatory framework must start with understanding the nature of power interactions, the actors involved, and their use of legal loopholes. Legal loopholes are important because they show the magnitude and the size of the mismatch between what a regulation dictates and what actually happens. The restructuring of regulations must account for those who are involved in these activities – and who facilitate and sanction them – while simultaneously having a thorough understanding of those who benefit from and are harmed by them. Instead of maintaining a dualistic vision of who is legal or illegal, a new regulatory framework should analyze how to integrate a production chain that counts with the participation of informal actors and their networks.

