

MINERAL EXPLORATION PROCEDURE(S) IN BRAZIL UNDER A NEW LEGAL SCENARIO

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ABSTRACT

Brazil is one of the most important mining countries of the world. Since the year of 2011, the Brazilian government intends to modify the mining legislation currently in force (mainly composed by the Decree-Law #227/1967 and Decree #62.934/1968) and, for this purpose, at least 8 legislative bills were submitted for the appreciation of the Brazilian National Congress. Even though the proposed changes comprise regulatory, tax and institutional aspects, this paper aims at analyzing the main modifications concerning the regulation of the mineral exploration phase, which, under the new legal framework, may be subject to procedural alterations. Therefore, the paper presents the current exploration phase procedure and describes the prospective modifications, not only focusing on financial matters, but also indicating the new competitive and granting criteria to be potentially implemented in Brazil. Such key subject is extremely valuable for national and international mining companies once the possible legal alterations on the mineral exploration phase procedure may impact future investments in the mining activity in Brazil. In view of this, the paper poses the current legislative scenario concerning the bills and law proposals in order to enable the mining companies to better prepare themselves for the possible regulatory changes that may arise from the New Brazilian Mining Code.

KEYWORDS

Mineral exploration, exploration phase, legislative bill, Brazilian law, Mining Code.

INTRODUCTION: BRAZIL, A COUNTRY WITH EXTENSIVE MINING POTENTIAL

According to several mining surveys, Brazil is one of the most important mining countries in the world and one of the most relevant targets for international investments in mining.

Among the many reasons that may be claimed to justify the Brazilian relevance in the international mining scenario, the natural richness of the Brazilian territory seems to represent the most obvious and plausible explanation. In fact, there is a wide range of mineral occurrences throughout the national territory, encompassing, for instance, metallic minerals, aggregates, mineral water, precious stones, noble metals, rare earths, fertilizers, etc.

Under a domestic view, the mining sector represents a vigorous and strategic area for the national economy. The importance of the sector is clearly indicated by the significant rates of job creation and tax collection that result from the entire mining productive chain.

As per the Information and Analysis on the Brazilian Mineral Economy (IBRAM, 2012, page 10), "studies conducted by the Minister of Mines and Energy's Secretariat for Geology, Mining and Mineral Processing show that the multiplier effect of job creation is 1:13 in the mining sector, i.e., for every job created in the mining sector another 13 jobs (direct jobs) are generated along the supply chain.

Therefore, in 2011 the mining sector employed about 2.2 million workers directly, not including the job posts generated in research, exploration and planning, and the manpower employed in the mines.” (IBRAM, 2012, page 10).

It is important to note that, pursuant to the same study (IBRAM, 2012, page 10), “informal work arrangements in the mining industry cannot be ignored, especially when it comes to minerals of high unit value (gems, gold, diamond, etc.), and also in the extraction of mineral aggregates for the civil construction sector.

Many workers across Brazil’s 5,565 municipalities fail to be covered by official statistics. Estimates, though very inaccurate, indicate somewhere between 300 thousand and 500 thousand workers” (IBRAM, 2012, page 10).

In regards with the tax income, the Financial Compensation for Mineral Production (Brazilian Portuguese acronym “CFEM”) represents one of the most important mining charges in Brazil. The payment of CFEM is stipulated by the Brazilian Federal Constitution and is due once the mining titleholder conducts exploitation works.

The amount collected by the entrepreneur is distributed between federal authority (on the proportion of 12% of the total amount), the state where the mineral resource is exploited (on the proportion of 23% of the total amount) and the municipality where the mineral resource is exploited (on the proportion of 65% of the total amount). The rates are based on the net revenue and vary from 0.2% to 3% according to the mineral substance exploited.

Pursuant to Information and Analysis on the Brazilian Mineral Economy (7th Edition), “in 2012, the royalties (CFEM) reached a new record of R\$1,832 billion”, which demonstrates the importance of such income for the financial health of several states and municipalities that host mining enterprises (IBRAM, 2012, page 9).

Besides all the above mentioned, the importance of the mining sector for the national economy surpass its positive effects on employment and tax statistics.

Aside from that, the mineral commodities occupy a significant place on the Brazilian exports composition. The iron ore, for instance, is a traditional component of the Brazilian international sales and, thus, contributes – significantly - for the profitability of the mining activity in the country.

THE CURRENT BRAZILIAN MINING LEGISLATION

The mining activities in Brazil are mainly regulated by the Decree Law #267, enacted on February 28th, 1967 (the Brazilian Mining Code), the Decree #62,934 , enacted on July 2nd, 1968 and further rules issued by the Minister of Mines and Energy and the General Director of the National Department of Mineral Production.

The Ministry of Mines and Energy and National Department of Mineral Production are the main regulatory agencies in charge of the inspection of the mineral activities throughout the Brazilian territory.

Due to this fact, a wide range of mineral procedures are ruled by normative acts enacted on federal level by these authority instances.

Considering that the Brazilian Mining Code was enacted in 1967, many governors qualified the legislation as outdated and inadequate to rule the modern mining activity in the country.

Therefore, the Brazilian Government has been inclined to modify the Brazilian Mining Code since the year of 2011. For this purpose, many different legislative bills were submitted to the appreciation of the Brazilian National Congress.

Under a general view, the proposed modifications contemplate tax/fiscal, regulatory and institutional matters.

Nonetheless, this paper aims at analyzing the main modifications concerning the regulation of the mineral exploration phase, which, under the new legal framework, may be subject to procedural modifications.

MINERAL EXPLORATION PROCEDURE IN BRAZIL: CURRENT LEGAL SCENARIO

According to article 176 of the Brazilian Federal Constitution, the mineral resources are property of the country and may be explored/exploited by individuals and companies (who shall be Brazilian citizen or company organized under Brazilian law with headquarters and administrative body located in the country) through federal authorization.

The Brazilian mining legislation prescribes different regimes for the performance of mining activities considering, for instance, the type of the mineral substance or the stage of the mineral activity.

Nevertheless, the performance of mining activities in Brazil is usually conducted under the authorization (for mining exploration) and concession (for mining exploitation) regime.

On broad terms, under this regime, the interested party in developing mining activities in Brazil shall request the respective authorization before the National Department of Mineral Production.

The current mineral exploration in Brazil is based on the *first come first serve* criteria. Therefore, the applicant who firstly submits the respective request shall have priority over the area whether the (i) application contains all the prerequisites established by the mining legislation and (ii) the area is not covered by any prior request or title.

The Exploration Permit may be granted to individuals or companies with a period that might vary from 1 (one) year to 3 (three) years (able to be extended).

During the exploration phase, the titleholder shall comply with certain obligations prescribed in the mining legislation. Amongst such obligations, it is worth to highlight the mandatory payment of the Annual Tax per Hectare which is due to the National Department of Mineral Production (charged on the amount of R\$3.06 per hectare during the original term of the Exploration Permit and R\$4.63 per hectare during the extension term of the Exploration Permit).

The exploration works developed by the titleholder are essential for the definition of the technical and economic feasibility of the mineral reserve and consequent obtainment of the Exploitation Permit (or Mining Concession) that allows the extraction of the mineral substance.

It is important to note that, under the Brazilian legal framework, the surface rights are distinct from the mining rights and, thus, shall be negotiated separately. Therefore, in order to perform its exploration works, the titleholder shall pay to the surface owner indemnification and compensation costs in regards to the usage of the real estate.

MINERAL EXPLORATION PROCEDURE IN BRAZIL: PROPOSED LEGAL SCENARIO

Since the year of 2011, the intention to modify the Brazilian Mining Code currently in force has occupied the federal government agenda.

Many reasons are usually raised to justify the task and guide the purpose. Amongst the most common explanations, the governors in favor of the legal changes indicate, for instance, the need to update the Brazilian Mining Code (enacted in the year of 1967), the need to replace the National Department of Mineral Production for a regulatory agency (invested with administrative and financial autonomy) and the need to increase the public income that results from the mineral activities.

On this context, from 2011 to the current year, ten legislative bills have been submitted to the appreciation of the Brazilian National Congress concerning legal changes on the mining legal

framework. They were numbered as: 37/2011; 463/2011; 3403/2012; 4679/2012; 5138/2013; 5306/2013; 5807/2013; 8065/2014; 3587/2015 and 3726/2015.

Considering the theme similarity and in order to better organize and optimize their respective appreciation, the legislative bills were attached to the bill #37/2011 which means that the examination of each individual bill shall not be conducted in disconnection with the other legal texts.

In face of the specific purpose of this paper and as the above mentioned legislative bills contemplate a wide range of mining issues, it shall be highlighted the bills that contain provisions regarding modifications on the mining exploration procedure, as follows.

Legislative Bill #37/2011: the performance of mining activities (including the exploration works) shall be preceded by a bidding process. It is important to highlight that, according to the provisions established by the original version of this specific legislative bill, only companies (not individuals) would be able to participate in the respective bidding process.

Nonetheless, under the regular legislative procedure, the congressman ahead of the initial legislative works presented to the House of Representatives a substitutive version of the bill which contemplates several suggestions of the productive sector.

This modified version prescribes the possibility of the grant of mining titles to individuals (not only to companies) and stipulates other criteria for the issuance of mining titles (not only through bidding processes). Moreover, during the mining exploration phase, the titleholder shall pay an Inspection Tax on amounts that may vary from R\$2,500.00 to R\$80,000.00 (depending on the size of the company).

Legislative Bill #463/2011: the *first come first serve* criteria is maintained under the exploration phase. Nevertheless, once the Final Exploration Report is approved, a bidding process is initiated for the selection of the future holder of the mining concession.

Therefore, the original titleholder of the exploration permit may not win the bidding process and, thus, may not be entitled to the mining concession. In such case, the original titleholder of the exploration will be entitled to receive a monthly payment as a financial participation in the economic results of the exploitation activities.

Legislative Bill #4679/2012: this specific legislative bill governs the exploitation of strategic mineral reserves. The proposed provisions do not stipulate the rules for the exploration phase. Nonetheless, the legislative bill prescribes that the exploitation phase shall be preceded by a bidding process.

In case the exploration permit titleholder does not win the bid, the winner shall reimburse the costs of the exploration works. Moreover, the exploration permit titleholder will be entitled to a 10% participation on the net revenue resulted from the exploitation activities.

Legislative Bill #5306/2013: the mining exploration phase shall be governed by the *first come first serve* criteria or shall be preceded by a bidding process under certain circumstances, such as on the cases that the previous titleholder resign on the exploration permit or the exploration permit is somehow revoked or extinct.

Under the exploration phase, the respective titleholders shall make an annual payment for the occupation of the area in favor of the federal authority. The amount of the payment shall be based on the extension of the area occupied by the titleholder.

Legislative Bill #5807/2013: the original version of this specific legislative bill stipulated the performance of bidding procedures as a general rule for the issuance of exploration permits. After several claims mainly raised from the mining entrepreneurs, a substitutive version was prepared by the congressman in charge of the analysis of the bill. Under this new version, the bidding process criteria is entirely replaced by the *first come first serve* criteria.

The payment of an annual amount for the occupation of the area is due by the titleholder in favor of the federal authority.

Legislative Bill #8065/2014: this specific legislative bill provides for the exploration and exploitation activities regarding the mineral substances “potassium” and “phosphate”. According to the proposed provisions, the issuance of exploration permits is based on the *first come first serve* criteria. Among the obligations applicable to the exploration phase, the titleholder shall, for instance, make the investments indicated on the Exploration Permit Plan and the annual payment regarding the occupation of the area.

CONCLUSIONS

As already indicated, the modification of the Brazilian Mining Code (and, consequently, of the mining exploration procedures) has been on the table of the National Congress since the year of 2011.

In 2013, the Brazilian Federal Government presented to the National Congress the bill #5807/2013 and centered the subject on special emphasis.

On the occasion, the president (Mrs. Dilma Rousseff) qualified the bill as a priority issue for the appreciation of the congressmen, which means that the National Congress would have 100 days to conclude the legislative procedure.

Considering the short time and the relevance of the matter, many politicians and the productive sector made a huge pressure to convince the president to revoke the priority order.

After all, the bill, on its original version, would provoke several and profound modifications on the current legislation which – according to the mining sector - could not be deeply discussed and appreciated during a so short period. To illustrate the complexity of the discussion, the original version of the bill was subject to 372 amendment proposals by the congressmen of the House of Representatives.

In view of this, the president called the bill off from the priority agenda of the National Congress in September of 2013 and, ever since, the subject seems to have been called off from the agenda of the presidency as well.

Nevertheless, the official movement of the federal government in order to modify the mining legislation, especially in the year of 2013, caused a scenario of legal and economic uncertainty which discouraged national and international investments in mining activities.

Even though the enactment of a new Brazilian Mining Code no longer occupies a central place on the federal government agenda, it is possible to identify that the future modifications in the mining legislation regarding the exploration procedures are guided by an intent to include a competition criteria for the issuance of exploration permits (such as bidding processes) and by an intent to increase rates of tax or compensation due to the regulatory authorities as a result of the performance of exploration activities (by means of an inspection fee or payment for the occupation of the mining area).

Considering the lack of certainty regarding the final term of the legislative process, the urgent modifications on procedural aspects of the mining legislation are being implemented through the enactment of administrative ordinances.

During the last year, for instance, the National Department of Mineral Production issued at least 15 administrative ordinances comprising relevant modifications of the mining legislation.

In view of this, a close monitoring of the Brazilian legal scenario is highly recommended for all those involved in the Brazilian mining sector (investors, titleholders, stakeholders etc.) in order to better prepare themselves for the legal modifications that may be implemented in a possibly near future.

REFERENCES

- Brazil. Federal Constitution. Retrieved from: http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm
- Brazil. Decree Law #227/1967. Retrieved from: http://www.planalto.gov.br/ccivil_03/decreto-lei/Del0227.htm
- Brazil. Legislative Bill 37/2011. Retrieved from: <http://www2.camara.leg.br/>
- Brazil. Legislative Bill 463/2011. Retrieved from: <http://www2.camara.leg.br/>
- Brazil. Legislative Bill 3403/2012. Retrieved from: <http://www2.camara.leg.br/>
- Brazil. Legislative Bill 4679/2012. Retrieved from: <http://www2.camara.leg.br/>
- Brazil. Legislative Bill 5138/2013. Retrieved from: <http://www2.camara.leg.br/>
- Brazil. Legislative Bill 5306/2013. Retrieved from: <http://www2.camara.leg.br/>
- Brazil. Legislative Bill 5807/2013. Retrieved from: <http://www2.camara.leg.br/>
- Brazil. Legislative Bill 8065/2014. Retrieved from: <http://www2.camara.leg.br/>
- Brazil. Legislative Bill 3587/2015. Retrieved from: <http://www2.camara.leg.br/>
- Brazil. Legislative Bill 3726/2015. Retrieved from: <http://www2.camara.leg.br/>
- Brazilian Mining Institute. (2012). *An optimistic outlook for mining in Brazil*. Retrieved from: <http://www.ibram.org.br/sites/1400/1457/00000364.pdf>.