

New Brazilian Mining Code Under Discussion At The National Congress

On June 19th, the Brazilian Government submitted to the National Congress a bill of law that sets forth the new legal framework for the country's mining sector. The changes outlined in the "New Mining Code", (as it is misnamed), could significantly alter the current legal framework, which dates from the 1960s.

1. Introduction.

The changes to the current mining laws proposed by the government are aimed, mainly, to promote a 'righteous' exploitation of minerals. The method of doing so, however through an increase of State authority has resulted in controversy within the mining industry. Moreover, the Government has also demonstrated its intention to use this change in law as an opportunity to increase the State's revenues from mining activities.

Since June, a heated discussion has been ongoing between Government, congressmen, industry, labor unions and civil society on the best legal methods to achieve the desired objectives. As a result of the wide array of opinions, numerous amendments have already been proposed to the bill of law.

Recently, on November 11, the special commission of the National Congress endowed with the authority to analyze the matter and include (or not) the proposed amendments as well as other demands from the private mining sector and civil society, released and proposed an amended bill of law. The amended bill of law is far more detailed than the original, bringing more legal certainty to mining entrepreneurs, however, it also reverts many of the key changes proposed by the Government.

Whatever final draft of law is approved, given the magnitude of the proposed changes, no doubt the New Mining Code will represent a watershed for mining activities in the country. Nonetheless, it is unclear whether such a turnaround will be positive for the industry or not. Below we analyze the most important changes being proposed as an exercise to get closer to an answer.

2. The National Mining Agency and the National Counsel of Mining Policies

The proposed New Mining Code intends to dissolve the National Department of Mining Policy (the Departamento Nacional de Política Minerária, "DNPM") and create a regulatory agency, the National Mining Agency (the Agência Nacional de Mineração, "ANM"), endowed with the authority to regulate and supervise the mining sector, akin to those regulatory agencies currently existing in the Brazilian oil & gas, telecom and electrical sectors.

A number of the ANM competencies, however, have attracted heated criticisms. For instance, the Government has proposed that the ANM would have the authority to approve (or not) the assignment, directly or indirectly, of mining titles in whatever form, i.e., including corporate transactions that result in a change of control or even the merger of the direct holder of a mining title.

This controversial provision has been amended by the National Congress' special commission. According to the new text of the bill of law, the only transfer of mining titles subject to prior approval by the ANM would be direct transfers, as occurs in other regulated sectors in Brazil. Indirect transfers through change of control or a corporate restructuring will be subject only to a compulsory communication to the ANM within 30 days after such an event, provided that minimum financial, technical and legal standards (fixed by the ANM) are observed.

Furthermore, the bill of law proposes the creation of a National Counsel of Mining Policies (the "NCMP"). Similar to what occurs in other Brazilian regulated sectors, this counsel will report directly to the President and will be responsible for promoting national mining policy.

3. Priority Right v.s. Public Biddings

One of the Brazilian Government's main complaints about the mining industry is the underperformance of mining companies regarding the exploration of potential mining areas and the exploitation of mineral deposits.

This underperformance is allegedly due to the priority right system currently in force. Under this system, an exclusive exploration title is granted to whomever first requests it. As a result, many entrepreneurs with no technical or financial capability to invest in substantial research or production have acquired mining titles with the aim of speculating such titles with mining companies.

The method proposed by the government to strike down such a scenario was to implement a new system for the granting of mining rights, through public biddings, organized by the ANM. The winning criteria for the public auctions would be set forth in a tender protocol, but should include a Signature Bonus and a Discovery Bonus, the percentage in participation in the revenues, and/or the scale of the exploration plan.

This proposed new system has been at the epicenter of criticisms of the law amendment. According to certain members of the mining community, this would slow down the pace of mining exploration activities, since it would mostly rely on the State's activities and initiative.

The amendments to the bill of law presented by the National Congress' special commission have, however, restricted such bidding processes to the mining titles which the government already holds and where there is proven commercially-viable mining deposits. On the other hand, the mining companies will be subject to stricter controls to make sure they are in full compliance with the minimum activity levels they have committed to.

Currently, there are ongoing negotiations between the government, on one side, and the National Congress and mining companies, on the other side, aiming to find a solution to this deadlock. It is still to soon, however, to determine which of the systems will prevail.

4. The Mining Title

Another of the most significant changes proposed by the Government to the regulatory framework is the unification of the current exploration and exploitation licenses under one single mining license. This license would, however, include an 'exploration phase', akin to the Brazilian oil and gas concessions or as currently occurs under other mining legal systems, such as in China.

During an exploration phase, miners would have to comply with certain minimum exploration obligations, which shall be set forth in the concession contracts. The scale of the exploration phase would be based on the size of the mining area and the availability of data.

The amended bill of law, however, has also reverted this change, although it still allows the ANM to create minimum exploration commitments for the owner of a mining title.

The unified mining title, as initially proposed, would have a fixed term, limited to a maximum of 40 years. The license, however, would be renewable indefinitely, through extensions of up to 20 years, so long the requirements set forth under the concession contract have been fully complied with.

The amended bill of law, however, provides for a fixed term, up to a maximum 6 years for the exploration license, and a maximum of 30 years for the production license, although it would be extendable indefinitely for periods of 15 years, provided that certain minimum standards have been observed.

5. Financing of Mining Activity

The amended bill of law has also shown a sincere concern to facilitate the financing of mining activity. It has thus, enabled mining companies to pledge their mining titles and, moreover, to record chattel mortgages over them. Such encumbrances would be registered with the ANM and would be accessible to the public.

Furthermore, the amended bill of law proposes the creation of mining bonds backed on mining titles. Such mining bonds, subject to the general provisions set forth under the Brazilian Civil Code, would be suitable for selling and trading on stock exchanges.

6. Tax Provisions

The proposed New Mining Code will also bring significant changes to the mining tax provisions. The first of them is that the royalties from mineral exploitation (the *Compensação Financeira pela Exploração de Recursos Minerais*, “CFEM”) will no longer be levied on the net revenues of mineral sales, but on gross revenues. Nonetheless, the value of other taxes also levied on the commercialization of mineral production may be deducted from the amount of royalties owed.

Further to this, the original draft of the bill of law proposed by the Government fixed a band for the CFEM, allowing, for example, it to go up to 4% in the case of iron ore, instead of the current 3% limit. The amounts, within the bands, would be fixed by the Federal Government by decree.

The National Congress’ committee has also reverted the Government’s intention in that respect, based on the argument of enforcing legal certainty, by eliminating the bands and proposing that the CFEM’s levels be fixed by the National Congress, in the Mining Code. The levels of the CFEM, however, are still under discussion.

7. Transitional Regime

The draft law amendment provides for full recognition of exploration authorizations and mining concessions granted under the current mining regime, so long as the exploration or mining activities, as applicable, are in compliance with their respective legal obligations.

8. Conclusion

Given the magnitude of the changes being proposed, there is no doubt that the New Mining Code is a plentiful source of controversy and a final draft is still being constructed. From new standards and proceedings for the acquisition of a mining license to new tax provisions, the Brazilian mining regulatory framework is being completely remade.

However, the success or failure of the new legal system will still largely depend on the regulations issued by the new ANM. Hopefully, the new agency will be as market-conscious as the Brazilian Oil and Gas National Agency is.

The fast pace of the changes may initially create an atmosphere of legal uncertainty that could harm the development of business for mining companies with activities in Brazil. Hence, it is vital that each of them make a careful study of the new legal environment before making significant decisions.

Tauil e Chequer Advogados in association with Mayer Brown LLP has the expertise necessary to assist mining market players in this new legal environment. With significant expertise not only in the mining sector but also the firm is reputed for its unique oil and gas practice. We sincerely hope this report has been enlightening and we are confident that we can assist you with your questions and concerns.

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