

Main aspects of the Brazilian mining sector reform

On December 18 and 26, 2017, President Michel Temer enacted the two laws previously approved by Brazilian Congress for the reform of the Brazilian mining sector¹. Law No. 13,540/17 changed the regulation of the Financial Compensation for the Exploitation of Mineral Resources (*Compensação Financeira pela Exploração de Recursos Minerais – CFEM*) and Law No. 13,575/17 replaced the National Department of Mineral Production (*Departamento Nacional de Produção Mineral – DNPM*) with the National Mining Agency (*Agência Nacional de Mineração – ANM*). A third bill of law originally encompassed in the reform, which intended to change provisions of Decree-Law No. 227, dated February 28, 1967 (Brazilian Mining Code), did not become effective.

The reform aims to modernize the Brazilian mining legal framework by increasing the level of independence and the surveillance prerogatives of the regulatory agency, including those relating to compliance with environmental legislation by mining activities. The new laws in general increase the costs applicable to mining activities. On the other hand, the so-called Surveillance Charge for Mining Activities (*Taxa de Fiscalização de Atividades Minerárias – TFAM*) was not approved, as it was suppressed in the approval process of Law No. 13,575/17.

The main aspects of the Brazilian mining sector reform are set forth below.

Mineral exploitation regimes

The new legislation does not modify the regimes set forth in the Brazilian Mining Code for research and exploitation of mineral resources. The mining concession is the regime applied to the exploitation of most mineral resources in Brazil², preceded by a research authorization.

The party interested in exploiting mineral resources in Brazil shall request to ANM a research authorization for a given area and period. The ANM will deny it or require adaptations to, or the fulfillment of demands for, the authorization in case the area is already covered in whole or in part by one or more existing mining rights. The party that obtains the authorization, develops its research and timely obtains ANM approval for its final mining research report³ will be entitled to request a mining concession to the minister of Mines and Energy. The minimum period of duration of the research authorization is one year. The legislation leaves the number of renewals of the authorization up to the regulator⁴. Mining concessions and authorizations can be transferred to third parties with the consent of the Minister of Mines and Energy or of ANM, respectively, even if the assignor or the assignee has outstanding debts with the ANM registered as federal collectible debts.

The relatively low barriers for initiating mineral research is a positive aspect maintained by the new regulatory framework, especially when taking into consideration the substantial costs that mineral research entails. Moreover, the possibility of transferring mining rights encourages transactions in this sector.

Independence and supervision prerogatives of the regulatory body

The replacement of the DNPM by the ANM aims to increase the independence and the budget of the regulatory body. The agency will have a board, formed by five members with

¹ The Brazilian mining sector reform was proposed by the Brazilian President by means of 3 so-called Provisional Measures (*Medida Provisória - PM*). Although a PM is effective as from the date of its publication, it must be approved by the two houses of Brazilian Congress within 120 days of such publication, failing which it loses effectiveness retroactively to the date of its issuance. Only 2 of the 3 PMs originally proposed to reform the Brazilian mining sector were timely approved by Congress.

² The Brazilian Mining Code also sets forth the regimes of: (i) permission for independent mining (*permissão de lavra garimpeira*), applicable to individual independent miners; (ii) monopolization (*monopolização*), applicable to minerals under special regimes and exploitable solely by the Brazilian Federal Government; and (iii) licensing (*licenciamento*), applicable to the exploitation of sand, rocks and clay for immediate use in civil construction.

³ Such report has to demonstrate to the agency that the intended economic exploitation of the researched mineral resources in the applicable area is feasible.

⁴ The reform originally proposed a limit of a single extension, aiming to end an interpretation issue existent under the previous mining laws and regulations. However, this proposal did not become effective.

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fixed terms of office. Proposals for regulation will be subject to prior public consultations, which should enhance the agency's transparency and independence.

Law No. 13,575/17 establishes sources of funds for the ANM and seeks to solve the insufficiency of funds faced by the previous mining regulatory body, which affected its efficiency.

Two sources of funds for the ANM set forth in the originally proposed reform did not become effective. Firstly, the mechanism of public auctions for the research and exploitation of free areas declared so by decision of the ANM or the minister of Mines and Energy. Furthermore, the Surveillance Charge for Mining Activities (*Taxa de Fiscalização de Atividades Minerárias – TFAM*), which originally aimed to increase the financial autonomy of the ANM, was suppressed. The TFAM would be charged annually, in a progressive manner, in each phase of the mining process.

The originally proposed reform also intended to increase the maximum fine for breaches of mining laws to R\$30 million and establish additional penalties, such as the temporary suspension of mining activities, the seizure of ores and equipment and the possible forfeiture of the mining right. However, such proposals did not become effective and amounts of fines for breaches of the mining legislation were maintained, ranging from 100 to 1,000 UFIR (Fiscal Reference Unit – *Unidade Fiscal de Referência*), depending on the gravity of the infringement.

A proposal to authorize the ANM to demand biannual reports on the progress of the research did not become effective. This initiative could have had a positive effect, as it would discourage private parties from obtaining research authorizations and subsequently neglecting the mining research, preventing other parties from performing adequate investigations. This has been a frequent problem in the Brazilian mining sector.

Changes in costs

The originally proposed reform sought to increase the CFEM rates for practically all mining resources. Law No. 13,540/17 effectively increases the CFEM rates levied upon the extraction of gold and diamonds. CFEM rates levied upon the extraction of rocks, sand, gravel, clay and other mineral substances intended for immediate use in civil construction was reduced from 1.5% to 1%. On iron ore, a new rate of 3.5% was imposed, with the possibility of a Presidential Decree, to be published until March 18, 2018, establishing criteria under which the ANM may reduce it to no less than 2%.

The CFEM was previously calculated based on the net sales (*faturamento líquido*) of mineral products, deducting taxes levied upon such sales and insurance and transportation expenses. According to Law No. 13,540/17, the compensation is now due based on the gross revenues (*receita bruta*) of sales of mineral products, preserving the deductibility of taxes and expenses imposed thereon⁵.

The assignee of a given mining right will be jointly and severally liable with the assignor for any CFEM debts existing prior to the assignment. In case of leasing of mining rights, the lessor will be liable for CFEM debts in a secondary manner in relation to the lessee. These matters need to be considered in legal due diligences for transaction involving entities performing mining activities.

Other costs to which mining activities are subject have also been increased. Owners of real estates where mineral activities are performed shall allow the development of such activities by parties entitled to mining rights, but have the right to receive part of the outcomes of the exploitation, corresponding to 50% of the amounts paid as CFEM. With the increase in the CFEM, the amount due to the owner of the property will also increase. Other amounts due to

⁵ Additionally, CFEM will be levied upon (i) the consumption of mining products, based on the calculated gross revenue, considering the current price of the product in the local, regional, national or international market, as the case may be, or the reference value, defined by the final value of the product obtained after the conclusion of the processing; (ii) exports, over the calculated revenue, taken as calculation basis, at least, the baseline price determined by the Federal Revenue Secretariat; (iii) in case of a mineral good acquired in a public auction, on the value of the sale; or (iv) in the case extraction under the regime of independent miners, based on the value of the first purchase of the mining product.

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landowners by parties entitled to mining rights that were not revoked by the mining reform are: (i) revenues for the occupation of the land – corresponding to the loss of revenues of the landowner due to the occupation of the area by mining activities, in whole or in part; and (ii) indemnification for damages caused by mining activities to the respective land.

Environmental aspects

Important changes originally proposed in relation to environmental aspects on the Brazilian Mining Code did not become effective. For example, the closing of mines and environmental recovery of affected areas will not form an integral part of the mining activity. The ANM shall approve rules and perform surveillance, in a supplementary basis in relation to environmental authorities, over the environmental control of the activity, according to Law No. 13,575/17.

The reform also missed the opportunity to create a specific set of regulations relating to environmental licensing of mining activities. Currently, the lack of predictability in environmental licensing proceedings represents a significant barrier to the expansion of the sector.

Other changes

Law No. 13,540/17 also: (i) permits a deduction of 50% of the amount of CFEM in case of presence of mineral waste applied in other productive chains; (ii) alters the manner of distributing CFEM amounts among federative entities and other governmental bodies related to mining activities and environmental protection; and (iii) sets forth the possibility of imposition of fines in case the calculation of CFEM by private parties is lower than its effectively due amount, such fine corresponding to 30% of the amount of CFEM calculated by the regulatory authority.

Law No. 13,575/17 suppressed the following provisions set forth in the originally proposed reform: (i) permission for the ANM to accredit specialized professionals to issue opinions and reports to support the Ministry of Mines and Energy in certifying compliance with requirements imposed on owners of mining rights; (ii) banning the participation in ANM's board of any person who has held a position in trade unions; and (iii) the previously mentioned TFAM.

Final Remarks

The reform of the mining sector ended up being incomplete. It left out the relevant issue of environmental licensing in mineral enterprises, in addition to important advances set forth by the bill of law that was not approved by Brazilian Congress. The increase in the CFEM also has the potential of affecting the competitiveness of Brazilian mining products in relation to foreign players. On the other hand, the reform did well in increasing the autonomy and the surveillance powers of the sector's regulatory agency, even though such prerogatives were reduced in comparison with the originally proposed reform.

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