

## The new regulation of the Brazilian Mining Code

In the context of the mining sector reform, on June 12, 2018 President Michel Temer enacted Decree No. 9,406, which on December 9, 2018 will revoke and replace Decree No. 62,934, of July 2, 1968, as the regulation of the Brazilian Mining Code (Decree-Law No. 227, of February 28, 1967)<sup>1</sup>.

The new regulation intends to modernize the Brazilian mining legal framework, but it also brings aspects of questionable legality. In addition, one of the most important changes – the replacement of the National Department of Mineral Production (*Departamento Nacional de Produção Mineral* – DNPM) with the Mining National Agency (*Agência Nacional de Mineração* – ANM) – requires measures that, if not implemented, may affect the efficacy of the new agency.

### Positive aspects

The new regulation brings some positive innovations set forth in one of the bills of law originally intended to reform the mining sector, but which was not timely approved by Brazilian Congress, namely Provisional Measure 790, of July 25, 2017 (“PM 790”)<sup>2</sup>.

One such positive innovation is the adoption, for the purpose of reporting of research results, subject to ANM regulations, of international technical standards of classification of mineral resources and reserves<sup>3</sup>. The use of standardized international concepts facilitates comparisons between results of researches performed in different mining enterprises in national or foreign territory, to the benefit of national and foreign investors.

Also as set forth in PM 790, Decree No. 9,406 allows for the continuation of mining research even after the final research reports are filed with ANM at the time of the request for a mining concession. This allows the owner of the mining right to refine knowledge of the mineral deposit in question. Updated results can also be used to supplement the final research report delivered to the agency, as well as the economic mining plan regarding the exploitation of the mine.

Another innovation sought by PM 790 and maintained by the new decree regards areas no longer attached to a previously existing mining right, the so-called “released areas”. Such areas will be made available to third parties interested in mining exploitation, in competitive proceedings based on objective criteria, to be regulated by ANM. This new regime is expected to reduce speculation by agents not interested in effective mining activities. The preceding regulatory framework allowed anyone to request research authorizations over released areas, priority being given to the party that first filed a request. Many of such requesting parties were interested in obtaining the mining rights in order to sell them rather than to perform effective research.

The new regulation also deals with the possibility of mining concessions being offered as collateral for financing purposes, under proceedings to be defined by ANM. Although the encumbrance of mining concessions has been set forth in the Mining Code, specific reference to encumbrances for financing purposes was well received by the market.

### Matters of questionable legality

Some aspects that the new regulation brought from PM 790 are questionable, as they could not have been regulated by decree<sup>4</sup>.

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<sup>1</sup> Decree No. 9.407 was published on the same date, regulating: (i) the distribution of the so-called Financial Compensation for the Exploitation of Mineral Resources (CFEM) among municipalities and the Federal District affected by mining activities, when production does not take place within their territories; and (ii) the destination of a portion of 15% to compensate the loss of CFEM revenues by municipalities negatively affected by the law that regulated CFEM (Law No. 13,540, of December 18, 2017).

<sup>2</sup> The Brazilian mining sector reform was originally proposed by the Brazilian President by means of 3 so-called Provisional Measures (“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 enactment. Only 2 of the 3 PMs originally proposed to reform the Brazilian mining sector were timely approved by Congress. PM 790/17, which proposed amendments to the Brazilian Mining Code, was not timely voted and became ineffective.

<sup>3</sup> Measurements are to be made based on the so-called “inferred, indicated and measured mineral resources” and “probable and proved mineral reserves”.

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The completion of the mine decommissioning plan is now a condition for the extinction of the mining concession right (article 34, subsection XVIII). Furthermore, the decommissioning of the mine may require the environmental remediation of damaged areas (article 5, 3rd paragraph, subsection I). Jointly, these provisions mean that the failure to complete environmental remediation may hinder the extinction of the mining right.

The obligation to perform environmental remediation of areas affected by mining is set forth in the Brazilian Constitution<sup>5</sup>, but not as a condition for the extinction of the mining right. The new conditions, not set forth by law, for the extinction of mining rights creates practical problems, especially considering the time involved in remediation. If such remediation is a condition for the extinction of a mining right, at least two questions can be raised: (i) from the standpoint of the miner, will they remain subject to periodic obligations, such as annual exploitation reports, regardless of they not being effectively exploiting the mine?; and (ii) from the perspective of any third parties, will they be able to request mining rights in areas covered in whole or in part by the still existing right of the miner that previously exploited the area but has not yet completed remediation?

The second questionable point relates to penalties. Article 52 of the new regulation replicates article 63 of the Mining Code: penalties applicable to the breach of obligations stemming from mining rights are warning, fine and loss of mining right, depending on the gravity of the breach. Under the Mining Code, the maximum fine for breach of mining law is of 1,000 UFIR (corresponding to R\$1,064.10)<sup>6</sup>, doubled in case the breach is repeated. The new decree sets a maximum fine of R\$3,293.90, doubled in case the breach is repeated within a term of five years. The regulation also sets forth, in article 80, the attribution of ANM to annually readjust the amounts of fines applicable to the breach of mining laws and regulations. However, a decree is not to change what is set forth by law, and in this aspect it is illegal.

#### ANM Instatement

The new regulation shall become effective on the date ANM is instated (article 84, subsection II). The law that creates the new agency<sup>7</sup> sets forth that the Federal executive branch shall instate ANM. The same law determines that the five commissioners of the first ANM board, following indication by the President and approval by the Senate, are to be appointed upon effectiveness of the decree that approves ANM's regulation and structure.

Such commissioners were indicated by President Michel Temer. Hence, for the effective instatement of ANM, required measures include approval by the Senate of the ANM board of commissioners and issuance and effectiveness of a decree with the regulation and structure of ANM.

In practice, however, there is another issue to be handled for the efficacy of the future agency: lack of personnel. When the law that created ANM became effective, approximately 900 individuals from DNPM were transferred to the new agency, among which over 300 already reached retirement age. Hence, if instated today, ANM would have a staff corresponding to 2/3 of that of the DNPM, but with a substantially larger number of attributions. In order for the agency to operate efficiently, it is crucial that this understaffing issue is resolved, involving fund requirements to be previously approved by the Brazilian Ministry of Planning.

The new Brazilian legal and regulatory mining framework sought to create an independent mining agency, with regulatory and supervision prerogatives. However, if the body does not have sufficient staff to fulfill its duties, this legislative change will be of little practical effectiveness.

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<sup>4</sup> Under the Brazilian Constitution, federal decrees are to be issued by the President for the sole purpose of detailing how federal laws are to be complied with. Decrees are not to create rights and obligations, unless to the extent set forth in law.

<sup>5</sup> Article 225, Second Paragraph – The party that exploits mineral resources is obliged to remedy environmental damage, in accordance with technical solutions required by the relevant public authority, under the terms of the law (free translation).

<sup>6</sup> Regardless of having been discontinued in 2000, the *Unidade Fiscal de Referência* (UFIR) continued to be applied under several Brazilian laws, having maintained its value of the time of its discontinuation: R\$1,064.10.

<sup>7</sup> Law No. 13,575, of December 26, 2017.